A

LEMBAGA KEMAJUAN TANAH PERSEKUTUAN (FELDA) & ANOR

v.

B

AWANG SOH MAMAT & ORS

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG FCJ
ABDULL HAMID EMBONG JCA
ABDUL MALIK ISHAK JCA
C [CIVIL APPEAL NOS: D-01-21-2008 & D-01-22-2008]
26 JUNE 2009

CIVIL PROCEDURE: *Appeal - Estoppel - Estoppel by election - Defendants appealing against default judgment and also against refusal to*
D *set aside default judgment - Whether general rule of estoppel by election applied - Whether must adopt one of two alternatives - Whether there must be a positive act of election followed by a reaction from the other side - Whether both decisions appealable - Courts of Judicature Act 1964, ss. 3, 67(1), 68 - Rules of the High Court 1980, O. 35 rr. 1, 2*

E ***CIVIL PROCEDURE:*** *Judgment - Default judgment - Setting aside - Judgment obtained after trial where defendants and solicitors were absent - Applicable test - Whether "defence on merits" - Whether that of "reason for absence" - Rules of the High Court 1980, O. 35 r. 2*

F ***CIVIL PROCEDURE:*** *Judgment - Default judgment - Setting aside - Judgment obtained after trial where defendants and solicitors were absent - Reason for absence - Oversight to enter hearing date on firm's master diary - Whether an acceptable reason*

G ***TORT:*** *Damages - Assessment - Fraud and conspiracy to defraud - Plaintiffs numbering 354 individuals - Whether loss suffered to be proved by each individual - Quantum of loss claimed to be collectively shared - Whether no requirement for each plaintiff to testify - Standard of proof*

H The plaintiffs were 354 settlers in a land settlement scheme operated by the 1st defendant ('FELDA'), while the 2nd and 3rd defendants were the manager of the 1st defendant and a palm oil mill associated with the 1st defendant respectively. By an agreement between the plaintiffs and the 1st defendant, all oil palm
I fruits as harvested from the plaintiffs' scheme were sold to the 3rd defendant, with the profits thereof divided and shared between the plaintiffs and the 1st defendant. The plaintiffs alleged that the defendants had, either jointly or severally, deceived them in the

sale of the fruits, and in the circumstances filed an action for fraud and conspiracy to defraud against the defendants. The facts showed that before the commencement of the trial, upon the rumour that the 2nd defendant had passed away, the plaintiffs' solicitors wrote to the defendants' solicitors expressing a willingness to withdraw the suit against the 2nd defendant. There was however no response from the defendants' solicitors. Be that as it may, at the hearing of the suit on 13 January 2008, the defendants and their solicitors were absent, and the trial judge, after hearing the evidence of three witnesses of the plaintiffs, allowed the claim and ordered the 1st and 3rd defendants to pay: (ii) general damages of RM7.1 million; (ii) aggravated damages amounting to 10% of the award for general damages; (iii) interest at 8% per annum on RM7,810,000; and (iv) costs. The defendants applied to set aside the default judgment under O. 35 r. 1 Rules of the High Court 1980, but on 28 January 2008, the application was dismissed by the learned judge.

The defendants filed a notice of appeal against the decision of 13 January 2008 ('first appeal'), and another against the decision of 28 January 2008 ('second appeal'). At the hearing of the second appeal before the learned justices of appeal herein, the plaintiffs however raised a preliminary objection (encl. 15A) that the defendants, having filed the second appeal against the decision refusing to set aside the default judgment, ought to be estopped from pursuing with the first appeal. It was the plaintiffs' contention that upon the authority inter alia of *Yogananthy AS Thambaiya v. Idris Osman*, the defendants were estopped from pursuing with the first appeal. In retort, the defendants argued that: (i) they had the right to pursue both appeals; (ii) the plaintiffs' cause of action of conspiracy against them is not maintainable in law, as the 2nd defendant tortfeasor had passed away and not been substituted with; (iii) the default judgment of 13 January 2008 ought to be set aside, as the their solicitors' absence in court was attributable to a genuine mistake of failing to enter the hearing date in the firm's master diary; (iv) the damages awarded were excessive and unjustified, and in any case the trial judge had applied the wrong principle in awarding damages; and (v) the trial judge had applied the wrong standard of proof (*ie*, balance of probabilities test) to the case before him.

Held (dismissing preliminary objection and appeal)
Per James Foong JCA (Abdull Hamid Embong JCA concurring) delivering the majority judgment of the court:

(1) For the principle of estoppel to apply there must be an election made by one party and responded by the other who was encouraged by the election to adopt or persevere a line of conduct which he otherwise would have abandoned or modified. Here, there was no evidence that the defendants made such an election as they had proceeded with the two appeals simultaneously. Neither was there any evidence that the plaintiffs were encouraged by any election made by the defendants to alter their conduct of this case. The plaintiffs were in fact prepared to take on the defendants in both the appeals. (para 10)

(2) The Court of Appeal in *Yogananthy* did not lay down any general principle that once an appeal against an order of refusal to set aside made under O. 35 rr. 1 and 2 RHC was filed, an appeal against the default judgment cannot be maintained. It was on the ground that the appeal against the default judgment was defective that the Court of Appeal therein had dismissed the appeal; not for the filing of a concurrent application for re-instatement. Further, in *Yogananthy*, the appeal against the decision for the refusal to set aside the default judgment was filed much earlier than the appeal against the default judgment (and not simultaneously as in the present case) thereby creating an impression that an election has been made by the appellant resulting in the appellant being estopped. (paras 14-16)

(3) In an application to set aside a default judgment due to non-appearance, a distinction must be made between one where such judgment was obtained without a trial having proceeded and one which did. In the former, the major factor to be determined is "defence on the merits", while in the latter (*ie*, as in the present case), the prominent consideration is that of "reason for the absence". (*Evans v. Bartlam* (foll); *Barnes v. Kondel* (foll); *Shocked & Anor v. Goldschmidt & Ors* (foll); *Abdul Rafar Maimunni & Anor v. HM Latiff bin KM Haneefa* (foll); *Ng Chek Kiam & Anor (Heng Seng Fruit Dealer) v. Best Fruits Sdn Bhd* (foll). (paras 17, 19 & 21)

(4) The conduct of the defendants' solicitors is binding on the defendants. Here, the act of the defendants' solicitors is callous and speaks very poorly of them. Clearly, in this modern world of technology, poor management of a legal firm and lack of care to record a hearing date can no longer be tolerated. (paras 21-23)

(5) The causes of action of fraud and conspiracy to defraud are tortious in nature. In the case of fraud, the plaintiffs have claimed against the defendants jointly and/or severally and therefore each of the defendants is individually liable to the plaintiffs and there can be no question of the 1st and 3rd defendants being released by the plaintiffs on account of the death of the 2nd defendant. As for conspiracy, all the defendants are joint tortfeasors and therefore, when one of them dies, an action against the surviving tortfeasors continues to subsist without the strict necessity to substitute the deceased defendant. In short, the action continues against the remaining tortfeasors and the 1st and 3rd defendants must remain liable to the plaintiffs. (paras 29 & 30)

(6) The notes of evidence before the High Court showed no record that the plaintiffs have requested to withdraw their claim against the 2nd defendant. The plaintiffs' expression of a desire to release the 2nd defendant was not an act of withdrawal. In any case, when the defendants' solicitors failed to respond the request for confirmation on the death of the 2nd defendant, such intention to release naturally expires. (para 31)

(7) In a claim based on fraud and conspiracy to defraud, the plaintiffs should be entitled to the loss suffered as the result of the deprivation of their income or profit caused by the wrong committed by the defendants after taking into account the foreseeability factor. Here, the plaintiffs' third witness has given credible and uncontradicted evidence on how the amount of losses was arrived at and this has been accepted by the High Court. Though each plaintiff was not called to testify on their respective loss, we see no reason for this requirement since in this FELDA scheme all the plaintiffs have agreed to sell their crops to the 3rd defendant and the profits derived therefrom shared collectively by them with the 1st defendant. (paras 36 & 37)

(8) It is to be noted that the role of the 1st defendant, as a statutory body, was to assist the plaintiffs in raising their standard of living. Instead, we have here a situation of the 1st defendant cheating the plaintiffs. In a position of authority over the plaintiffs in the allotment of land in the said scheme, the 1st defendant had, after this suit was filed, threatened to evict the plaintiffs from the scheme for pursuing this action. Such intimidation weighs against the 1st defendant. The 3rd defendant is no better since they are associated with or is part of the 1st defendant. Given these circumstances, the trial judge's award of 10% of RM7,146,291 for exemplary damages is justified and not excessive. (para 39)

(9) The High Court had not applied the wrong standard of proof to the case before it. The trial judge has declared that even if proof beyond reasonable doubt is applied, his decision would still be the same. This is clear indication that the High Court has considered and applied the higher standard of proof in coming to a conclusion that the defendants are liable to the plaintiffs. (para 43)

Per Abdul Malik Ishak JCA (dissenting; dismissing preliminary objection but allowing appeal):

(1) There are no principles of law that require the defendants to be put to an election of their rights because both these two appeals are in respect of different matters, issues and questions of law. (para 60)

(2) Bearing in mind ss. 3 and 67(1) of the Courts of Judicature Act 1964, the decisions of the trial judge on 13 January 2008 and 28 January 2008 are appealable. These decisions are not caught by s. 68 of the Act in that they are appealable matters which can be heard by this panel. (paras 62-68)

(3) Enclosure 15A were entirely misconceived and ought to be struck out in limine for the reasons that: (i) the plaintiffs had filed a notice of motion to strike out the first appeal which application was dismissed by the Court of Appeal resulting in the present striking out application becoming *res judicata* and an abuse of process; and (ii) it was a ploy to circumvent the determination of first appeal on its merits. The proper

procedure was for the plaintiffs to oppose the appeal proper rather than filing an interlocutory application to strike out the notice of appeal. (para 22)

(4) We are herewith concerned with an application to set aside a judgment after a trial in the absence of the defendants and their counsel and hence different considerations apply as compared to an application to set aside a default judgment. The predominant consideration is not whether there was defence on the merits, but rather the reason as to why the defendants were absent. (para 80)

(5) The defendants solicitors' oversight of the actual date of the trial before the trial judge was a genuine mistake and not a deliberate one. Consequently, the trial judge erred in law when he failed to accept the reasons for the absence of the defendants and their solicitors on the date of the hearing. (paras 101 & 102)

(6) The main allegations of fraud, cheating and conspiracy against the 1st defendant hinged entirely on the actions of the second defendant as the representative, agent or employee of the former. That being so, with the demise of the 2nd defendant, it is doubtful whether the allegations can be adequately proved. Indeed, with the demise of the 2nd defendant, the whole case against the 1st and 3rd defendants cannot be sustained. (paras 105-107)

(7) It is not the duty of defendants to substitute or add any other person after the death of the 2nd defendant. The plaintiffs have decided and picked who to sue. Both the 1st and 3rd defendants must act through an individual in the person of the second defendant. As a joint tortfeasor, when the 2nd defendant died, that would be the end of the matter. (para 112)

(8) There was no documentary evidence before the trial judge to support the actual loss or estimated loss suffered by each individual plaintiff. The plaintiffs' claim was for damages, and so each and every one of the 354 plaintiffs must give evidence of the loss suffered. The trial judge however failed to take into account the failure of the plaintiffs to call each individual plaintiff to give evidence of actual loss alleged to

A be suffered by each one of them bearing in mind that individually each of them would have suffered a different quantum of loss. (paras 116, 148 & 149)

(9) In the absence of the defendants at the trial, a higher duty B is placed on the plaintiffs and the trial judge to abide strictly to the procedural rules relating to the admissibility of the documents that were produced and marked as exhibits. Sad to say this was not done. The trial judge had freely admitted documents without calling the makers of the documents. C And documents not previously agreed to by the parties were unilaterally admitted without calling for the makers thereof to testify. Hence, the judgment of the trial judge is unsafe to rely upon and the second appeal should be allowed. (paras 130 & 131)

D

(10) The defendants were prejudiced when they were deprived of the opportunity to defend the action. On the other hand, if the second appeal is allowed and the case be remitted to the High Court for a retrial, the plaintiffs would still have the opportunity to continue with their claim. The defendants just E wanted to have their day in court and to deprive them of that would be unjust and would likely lead to a real miscarriage of justice. (paras 117 & 118)

Bahasa Malaysia *Translation Of Headnotes*

F

Plaintif-plaintif adalah 354 peneroka dalam satu skim penempatan tanah yang diselia oleh defendan pertama ('FELDA'), sementara defendan kedua dan ketiga, masing-masing, adalah pengurus defendan pertama di skim berkenaan dan kilang minyak sawit yang G bersyarikat dengan defendan pertama. Melalui satu perjanjian di antara plaintif-plaintif dan defendan pertama, semua buah sawit yang terhasil dari skim plaintif-plaintif telah dijual kepada defendan ketiga, dengan keuntungan darinya dibahagi antara plaintif-plaintif dan defendan pertama. Plaintif-plaintif mendakwa bahawa H defendan-defendan, sama ada secara bersesama atau berasingan, telah menipu mereka dalam penjualan buah sawit tersebut, dan berikutnya telah memfail tuntutan terhadap defendan-defendan kerana fraud dan konspirasi fraud. Fakta menunjukkan bahawa sebelum perbicaraan bermula, peguamcara plaintif-plaintif, I berdasarkan khabar angin bahawa defendan kedua telah meninggal dunia, telah menulis kepada peguamcara defendan-defendan menyatakan kesediaan untuk menarik balik guaman terhadap

defendan kedua. Bagaimanapun, tiada apa-apa jawapan diterima dari peguamcara defendan-defendan. Walau apapun, di pendengaran saman pada 13 Januari 2008, defendan-defendan serta peguamcara mereka tidak hadir, dan hakim bicara, setelah mendengar keterangan tiga saksi plaintif-plaintif, telah membenarkan tuntutan sekaligus memerintahkan defendan-defendan membayar: (i) gantirugi am berjumlah RM7.1 juta; (ii) gantirugi teruk sebanyak 10% dari jumlah award gantirugi am; (iii) faedah pada kadar 8% setahun atas jumlah RM7,810,000; dan (iv) kos. Defendan-defendan memohon untuk mengenepikan penghakiman ingkar di bawah A. 35 k. 1 Kaedah-Kaedah Mahkamah Tinggi 1980, namun, pada 13 Januari 2008, permohonan ditolak oleh yang arif hakim.

Defendan-defendan memfailkan notis rayuan terhadap keputusan 13 Januari 2008 ('rayuan pertama'), dan satu rayuan lagi terhadap keputusan 28 Januari 2008 ('rayuan kedua'). Di pendengaran rayuan kedua di hadapan yang arif hakim-hakim rayuan di sini, plaintif-plaintif bagaimanapun membangkitkan bantahan awal (lampiran 15A) bahawa defendan-defendan, setelah memfailkan rayuan kedua terhadap keengganan mengenepikan penghakiman ingkar, seharusnya dihalang dari meneruskan dengan rayuan pertama. Menjadi tanggapan plaintif-plaintif bahawa, berdasarkan keputusan di dalam *Yogananthy AS Thambaiya v. Idris Osman*, defendan-defendan adalah diestop dari meneruskan rayuan pertama. Defendan-defendan berhujah bahawa: (i) mereka berhak meneruskan dengan kedua-dua rayuan; (ii) kausa tindakan konspirasi terhadap mereka tidak sah di sisi undang-undang kerana tortfeasor defendan kedua telah meninggal dunia dan tiada penggantian dibuat bagi mengambil tempatnya; (iii) penghakiman ingkar 13 Januari 2008 harus diketepikan, kerana ketidakhadiran peguamcara mereka di mahkamah adalah disebabkan oleh kesilapan tidak disengajakan untuk mencatat tarikh perbicaraan dalam diari utama firma; (iv) gantirugi yang diaward keterlaluan dan tidak berjustifikasi dan hakim bicara, walau apapun, telah menggunapakai prinsip yang salah dalam mengaward gantirugi; dan (v) hakim bicara telah menggunapakai standard pembuktian yang salah (iaitu ujian imbangan kebarangkalian) kepada kes di hadapannya.

Diputuskan (menolak bantahan awal dan rayuan) Oleh James Foong HMR (Abdull Hamid Embong HMR menyetujui) menyampaikan penghakiman mahkamah:

(1) Prinsip estopel hanya terpakai jika terdapat suatu pilihan yang dibuat oleh satu pihak dan dibalasi oleh pihak lain yang terdorong oleh pilihan tersebut untuk mengambil atau meneruskan dengan satu pendirian, yang mana itu tidak akan dilakukannya jika tidak disebabkan oleh pilihan yang dibuat tersebut. Di sini, tiada keterangan bahawa defendan-defendan membuat pilihan sedemikian kerana mereka telah meneruskan dengan kedua-dua rayuan secara serentak. Juga tidak terdapat keterangan bahawa plaintif-plaintif telah didorong oleh sebarang pilihan yang dibuat oleh defendan-defendan untuk menukar pendirian mereka dalam kes ini. Plaintif-plaintif sebenarnya bersedia untuk menghadapi defendan-defendan dalam kedua-dua rayuan.

(2) Mahkamah Rayuan di dalam *Yogananthy* tidak membentang apa-apa prinsip am bahawa sebaik sahaja suatu rayuan terhadap perintah yang menolak permohonan mengenepikan di bawah A. 35 kk. 1 & 2 difailkan, maka rayuan terhadap penghakiman ingkar tidak boleh dilakukan. Yang menjadi alasan Mahkamah Rayuan dalam kes tersebut menolak rayuan adalah kerana rayuan terhadap penghakiman ingkar di situ cacat; bukannya kerana pemfailan permohonan untuk pemulihan semula dibuat secara serentak. Juga, di dalam *Yogananthy*, rayuan terhadap keengganan mengenepikan penghakiman ingkar difailkan jauh lebih dahulu dari rayuan terhadap penghakiman ingkar (dan bukannya serentak seperti di dalam kes ini) sekaligus membangkitkan gambaran bahawa suatu pilihan telah dibuat oleh perayu mengakibatkan perayu diestop.

(3) Dalam suatu permohonan untuk mengenepikan suatu penghakiaman ingkar kerana ketidakhadiran, perbezaan harus dibuat di antara kes di mana penghakiman diperolehi tanpa apa-apa perbicaraan dan yang diperolehi melalui suatu perbicaraan. Dalam kes terdahulu, faktor penting yang perlu diputuskan adalah "pembelaan berdasarkan merit", sementara dalam kes terkemudian (seperti dalam kes di sini), pertimbangan utamanya adalah "sebab-sebab ketidakhadiran". (*Evans v. Bartlam* (diikuti); *Barnes v. Kondel* (diikuti); *Shocked & Anor v.*

Goldschmidt & Anor (diikuti); *Abdul Rafar Maimunni & Anor v. HM Latiff bin KM Haneefa* (diikuti); *Ng Chek Kiam & Anor (Heng Seng Fruit Dealer) v. Best Fruits Sdn Bhd* (diikuti). A

(4) Tatalaku peguamcara defendan-defendan adalah mengikat defendan-defendan. Di sini, tindakan peguamcara defendan-defendan adalah sangat tidak prihatin dan memberikan gambaran yang buruk terhadap mereka. Jelas bahawa dalam dunia teknologi yang serba moden kini, pengurusan firma guaman yang tidak cekap dan kealpaan untuk merekodkan tarikh perbicaraan sudah tidak lagi boleh dimaafkan. B C

(5) Kausa-kausa tindakan fraud dan konspirasi fraud adalah bersifat tort. Dalam kes fraud, plaintif-plaintif menuntut terhadap defendan-defendan secara bersesama dan/atau berasingan dan kerana itu setiap defendan adalah bertanggungan secara individu kepada plaintif-plaintif dan tidak timbul soal defendan-defendan pertama dan ketiga telah dilepaskan dari tanggungan ekoran kematian defendan kedua. Berhubung konspirasi fraud, kesemua defendan-defendan adalah tortfeasor bersama, dan kerana itu, apabila seorang dari mereka mati, maka tindakan terhadap tortfeasor yang masih hidup masih berjalan tanpa memerlukan penggantian defendan yang meninggal dunia tersebut. Pendeknya, tindakan masih berterusan terhadap tortfeasor yang masih hidup dan defendan-defendan pertama dan ketiga hendaklah terus bertanggungan kepada plaintif-plaintif. D E F

(6) Nota keterangan di hadapan Mahkamah Tinggi tidak menunjukkan sebarang rekod bahawa plaintif-plaintif memohon untuk menarik balik tuntutan terhadap defendan kedua. Peluahan niat oleh plaintif-plaintif untuk melepaskan defendan kedua bukanlah satu tindakan menarik balik tuntutan. Apapun, bilamana peguamcara defendan-defendan tidak menjawab permohonan untuk mengesahkan kematian defendan kedua, niat untuk melepaskan sedemikian gugur dengan sendirinya. G H

(7) Dalam tuntutan yang berdasarkan fraud dan konspirasi fraud, plaintif-plaintif harus berhak kepada kerugian yang ditanggung akibat dari kehilangan pendapatan atau keuntungan yang disebabkan oleh perbuatan salah defendan-defendan setelah mengambilkira faktor kebolehjangkaan. Di sini, saksi ketiga plaintif-plaintif telah memberi keterangan yang menyakinkan I

A serta tidak disangkal tentang bagaimana jumlah kerugian dicapai dan penjelasannya diterima oleh Mahkamah Tinggi. Walaupun tidak setiap plaintif dipanggil untuk memberi keterangan, namun kami tidak melihat perlunya berbuat begitu memandangkan dalam skim FELDA ini kesemua
B plaintif-plaintif bersetuju untuk menjual tanaman mereka kepada defendan ketiga dan secara kolektif bersetuju juga untuk berkongsi keuntungan dengan defendan pertama.

(8) Harus diingat bahawa peranan defendan pertama selaku
C badan berkanun adalah untuk membantu plaintif-plaintif dalam usaha menaikkan taraf hidup mereka. Malangnya, situasi yang wujud di sini menunjukkan defendan pertama telah menipu plaintif-plaintif. Memandangkan ia mempunyai kuasa berhubung pengagihan tanah di skim tersebut,
D defendan pertama telah, ekoran pemfailan guaman di sini, mengugut untuk mengusir plaintif-plaintif dari skim kerana mengambil tindakan undang-undang ini. Defendan pertama harus memikul akibat dari ugutan sedemikian. Maka, mengambilkira halkeadaan semua ini, award gantirugi teladan
E 10% dari RM7,146,291 seperti yang diberikan oleh hakim bicara adalah berjustifikasi dan tidak keterlaluan.

(9) Mahkamah Tinggi tidak menggunapakai standard pembuktian yang salah kepada kes di hadapannya. Hakim bicara telah
F menyatakan bahawa jikapun pembuktian di luar keraguan munasabah digunapakai, keputusan beliau tetap sama. Ini merupakan petanda jelas bahawa Mahkamah Tinggi telah menimbang dan menggunapakai standard pembuktian yang lebih tinggi tersebut dalam mencapai rumusan bahawa
G defendan-defendan adalah bertanggungan kepada plaintif-plaintif.

Oleh Abdul Malik Ishak HMR (menentang; menolak bantahan awal tetapi membenarkan rayuan):

H **(1)** Tidak ada prinsip undang-undang yang mengkehendaki defendan-defendan supya membuat pilihan memandangkan kedua-dua rayuan di sini adalah berhubung dengan halperkara, isu dan persoalan undang-undang yang berbeza.

I **(2)** Mengambilkira ss. 3 dan 67(1) Akta Mahkamah Kehakiman 1964, keputusan yang dibuat oleh hakim bicara pada 13 Januari 2008 dan 28 Januari 2008 adalah boleh dirayui.

Keputusan-keputusan ini tidak dirangkumi oleh s. 68 Akta dalam ertikata ia adalah halperkara boleh dirayui dan boleh dengar oleh panel ini.

(3) Lampiran 15A langsung tidak berasas dan harus dibatalkan in limine disebabkan: (ii) plaintif-plaintif telah pun memfail notis usul untuk membatalkan rayuan pertama di mana permohonan itu ditolak oleh Mahkamah Rayuan sekaligus menjadikan permohonan semasa untuk membatalkan *res judicata* dan suatu salahguna proses; dan (ii) ia adalah satu helah untuk mengelakkan pemutusan rayuan pertama di atas meritnya. Prosedurnya yang betul adalah bagi plaintif-plaintif menentang rayuan sebenar dan bukannya memfailkan permohonan interlokutori bagi mengenepikan notis rayuan.

(4) Kita di sini berhadapan dengan permohonan untuk mengenepikan penghakiman selepas suatu perbicaraan yang tidak dihadiri oleh defendan-defendan dan peguam mereka dan kerana itu pertimbangan yang berbeza hendaklah dipakai berbanding dengan permohonan bagi mengenepikan penghakiman ingkar. Pertimbangan yang utama bukanlah sama ada terdapat pembelaan di atas merit, tetapi sebab-sebab mengapa defendan-defendan gagal menghadirkan diri.

(5) Keterlepasan pandang tarikh sebenar perbicaraan oleh peguamcara defendan-defendan adalah sebenarnya satu kesilapan ikhlas dan tidak disengajakan. Oleh yang demikian, hakim bicara khilaf di sisi undang-undang bilamana beliau enggan menerima sebab-sebab bagi ketidakhadiran defendan-defendan serta peguamcara mereka pada tarikh perbicaraan.

(6) Dakwaan utama fraud, penipuan dan konspirasi terhadap defendan pertama bergantung sepenuhnya kepada tindakan-tindakan defendan kedua selaku representatif, agen ataupun pekerja defendan pertama. Dalam keadaan sedemikian, dengan kematian defendan kedua, ianya diragui sama ada dakwaan-dakwaan boleh dibuktikan. Malah, dengan kematian defendan kedua, keseluruhan kes terhadap defendan-defendan pertama dan ketiga tidak lagi boleh dipertahankan.

(7) Bukan menjadi tanggungjawab defendan-defendan untuk mengganti ataupun menambah mana-mana orang selepas kematian defendan kedua. Plaintif-plaintif telah memutuskan dan memilih sendiri siapa yang hendak didakwa. Kedua-dua defendan pertama dan ketiga semestinya bertindak melalui

A individu iaitu defendan kedua. Sebagai tortfeasor bersama, dengan matinya defendan kedua, maka halperkara terhenti dengan sendirinya.

(8) Tiada keterangan dokumentari di hadapan hakim bicara bagi
B menyokong kerugian sebenar atau kerugian yang dijangkakan yang ditanggung oleh setiap plaintif. Tuntutan plaintif-plaintif adalah untuk gantirugi, dan kerana itu setiap seorang dari 354 plaintif-plaintif hendaklah memberi keterangan mengenai kerugian yang ditanggung. Hakim bicara bagaimanapun gagal
C mengambilkira akan kegagalan setiap seorang dari plaintif-plaintif ini untuk memberi keterangan sedemikian walaupun setiap seorang dari mereka tentunya mengalami tahap kerugian yang berbeza-beza.

(9) Dalam ketidakhadiran defendan-defendan di perbicaraan,
D plaintif-plaintif dan hakim bicara memikul tanggungjawab yang lebih tinggi untuk mematuhi secara ketat kaedah-kaedah prosedur berkaitan kebolehterimaan dokumen-dokumen yang dikemukakan dan ditanda sebagai eksibit. Malangnya, ini
E tidak dibuat. Hakim bicara telah dengan sewenang-wenangnya menerimamasuk dokumen-dokumen tanpa memanggil pembuat dokumen-dokumen tersebut. Juga, dokumen-dokumen yang tidak dipersetujui sebelumnya telah diterimamasuk tanpa pembuatnya dipanggil untuk memberi keterangan. Oleh itu,
F penghakiman hakim bicara adalah tidak selamat untuk diberi pergantungan dan rayuan kedua seharusnyalah dibenarkan.

(10) Defendan-defendan telah diprejudis apabila dinyahkan peluang untuk membela tindakan. Sebaliknya, jika rayuan kedua dibenarkan dan kes diremitkan ke Mahkamah Tinggi
G untuk perbicaraan semla, plaintif-plaintif masih berpeluang untuk meneruskan dengan tuntutan mereka. Defendan-defendan hanya memohon peluang untuk membuat pembelaan dan menolak permohonan sedemikian berkemungkinan akan membawa kepada salahlaksana keadilan.

H **Case(s) referred to:**

Abdul Rafar Maimunni & Anor v. HM Latiff KM Haneefa [2008] 1 LNS 157 ***(foll)***

Ang Hiok Seng v. Yim Yut Kiu [1997] 1 CLJ 497 FC ***(refd)***

Ang Gin Lee v. PP [1991] 2 CLJ 857; [1991] 1 CLJ (Rep) 13 SC ***(refd)***

I *Annie Quah Lay Nah v. Syed Jafer Properties Sdn Bhd & Ors and Another Appeal [2007] 1 CLJ 1 CA* ***(refd)***

Asia Commercial Finance (M) Bhd v. Pasadena Properties Development & Ors [1990] 2 CLJ 961; [1990] 1 CLJ (Rep) 606 HC ***(refd)***

Barker v. Furlong [1891] 2 Ch 172 ***(refd)***
Barnes v. Kondel [1971] 1 Lloyds Rep 444 ***(foll)***
Bell v. The Midland Railway Company [1861] English Reports 142, 10 CB ***(refd)***
Benmax v. Austin Motor Co Ltd [1955] 1 All ER 326 ***(refd)***
Bonham Carter v. The Hyde Park Hotel, Ld [1948] WN 89 ***(refd)***
Buga Singh v. Koh Bon Keo [1966] 1 LNS 22 ***(refd)***
Burgess v. Stafford Hotel Ltd [1990] 1 WLR 1215 ***(refd)***
Burgoine v. Taylor [1878] 9 Ch D 1 ***(refd)***
Cassell & Co Ltd v. Broome And Another [1972] AC 1027 ***(refd)***
Cheah Yoke Thong v. PP [1984] 1 LNS 29 ***(refd)***
Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1994] 1 CLJ 19 HC ***(refd)***
Chong Khee Sang v. Pang Ah Chee [1983] 1 LNS 57 ***(refd)***
Cockle v. Joyce [1877-78] 7 Ch D 56 ***(refd)***
Cutler v. MacPhail [1962] 2 All ER 292 ***(refd)***
Delcont (M) Sdn Bhd v. Motor Sport International Ltd (Servant Or Agents At Federal Territory Labuan) & Ors [1996] 1 CLJ 450 HC ***(refd)***
Evans v. Bartlam [1937] AC 473 ***(foll)***
Gan Hay Chong v. Siow Kian Yuh & Anor [1975] 1 LNS 42 FC ***(dist)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Hj Yahia Ismail v. Bukah Mayah Pakeh, Paylak Saydi [1933] 7 FMSLR 86 ***(refd)***
Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd [1999] 1 CLJ 89 CA ***(refd)***
Hock Seng Construction Sdn Bhd & Anor v. Yeoh Poh Owi & Anor [2001] 4 CLJ 1 CA ***(refd)***
Jok Jau Evong & Ors v. Marabong Lumber Sdn Bhd & Ors [1990] 2 CLJ 625; [1990] 2 CLJ (Rep) 169 HC ***(refd)***
Kingdon v. Kirk [1888] 37 Ch D 141 ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***
Leong Hong Khie v. Public Prosecutor And Tan Gong Wai v. Public Prosecutor [1986] 2 MLJ 206 ***(refd)***
Lim Soh Wah & Anor v. Wong Sin Chong & Anor & Another Appeal [2001] 2 CLJ 344 CA ***(refd)***
Liew Geok Lan v. John Loh [1993] 3 CLJ 158 HC ***(refd)***
Markt & Co, Limited v. Knight Steamship Company, Limited, Sale & Frazar v. Knight Steamship Company, Limited [1910] 2 KB 1021 ***(refd)***
Meng Leong Development Pte Ltd v. Jip Hong Trading Co Pte Ltd [1985] 1 CLJ 20; [1985] CLJ (Rep) 8 PC ***(refd)***
Mohd Yusof Mohamad v. Electrolux Home Centres Sdn Bhd [1999] 2 CLJ 866 HC ***(refd)***
Ng Chek Kiam & Anor (Seng Heng Wholesale Fruit Dealer) v. Best Fruits Sdn Bhd [2006] 1 LNS 367 ***(foll)***
Packer v. Denny [1986] CA Transcript 310 ***(refd)***
Palmco Holding Bhd v. Sakapp Commodities (M) Sdn Bhd & Ors [1986] 1 LNS 124 ***(refd)***

A *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC* ***(refd)***
Redditch Benefit Building Society v. Roberts [1940] 1 Ch 415 ***(refd)***
Robinson v. Harman [1848] English Reports 154, 1 Ex 850 ***(refd)***
Rookes v. Barnard And Others [1964] AC 1129 ***(refd)***
B *Sally Wertheim v. Chicoutimi Pulp Company [1911] AC 301* ***(refd)***
Shaharuddin Abdul Rahman v. Satisah Ismail Sdn Bhd [1982] 1 LNS 29 ***(refd)***
Shocked & Anor v. Goldschmidt & Ors [1998] 1 All ER 375 ***(foll)***
Sri Jaya Transport Co Ltd v. Fernandez [1969] 1 LNS 177 ***(dist)***
Stone v. Smith [1887] 35 Ch D 188 ***(refd)***
C *Su Sh-Hsyu v. Wee Yue Chew [2007] 3 SLR 673* ***(refd)***
Sunley (B) And Company, Limited v. Cunard White Star, Limited [1940] 1 KB 740 ***(refd)***
Tajjul Ariffin Mustafa v. Heng Cheng Hong [1991] 2 CLJ 1212; [1991] 4 CLJ (Rep) 56 HC ***(refd)***
D *Tang Kwor Ham & Ors v. Pengurusan Danaharta Bhd & Ors [2003] 7 CLJ 205 HC* ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***
Tay Kheng Hong v. Heap Moh Steamship Co Ltd [1964] 1 LNS 202 ***(refd)***
The "Edison" [1933] Lloyd's List Law Reports Vol 45 No 5 ***(refd)***
E *The Duke of Bedford v. Ellis And Others [1901] AC 1* ***(refd)***
Yai Yen Hon v. Teng Ah Kok & Sim Huat Sdn Bhd & Anor [1997] 2 CLJ 68 SC ***(refd)***
Yap Fook Cheong & Anor v. Burkill (Malaya) Sdn Bhd & Anor [1991] 3 CLJ 1711; [1991] 1 CLJ (Rep) 499 SC ***(refd)***
F *Yogananthy AS Thambaiya lwn. Idris Osman [2006] 1 CLJ 430 CA* ***(dist)***
Watt Or Thomas v. Thomas [1947] AC 484 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 74, 75
Courts of Judicature Act 1964, ss. 3, 67(1), 68(1)(a), (2)
G Criminal Procedure Code, s. 307(1)
Evidence Act 1950, ss. 61-73A
Rules of the High Court 1980, O. 15 r. 12, O. 35 rr. 1(2), 2(1), (2), 6
Rules of the Federal Court 1995, r. 13

H **Other source(s) referred to:**
Halbury's Laws of England, 4th edn, vol 12, para 1138
McGregor on Damages, 16th edn, p 236
Sarkar's Law of Evidence, vol 1, p 1180

For the appellants - Dato' Cecil Abraham (Sunil Abraham, Teo Poh Oon, Tunku Alina Alias & Farah Shuhadah with him); M/s Wong Lu Peen & Tunku Alina
I

For the respondents - Yusfarizal Yussoff (Wan Rohimi Wan Daud, Muhd Azmi Talib & Asmadi Abu Bakar with him); M/s Wan Rohimi & Asmadi

[Appeal from High Court, Kota Bharu; Civil Suit No: 22-85-2002]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

James Foong FCJ:

Introduction

[1] The facts of this case are rather straight forward. On the date fixed for hearing, which was on 13 January 2008, neither the defendants nor their counsel turned up in court. The High Court Judge after giving indulgence of up to 10.30am decided to proceed with the hearing of the case in the absence of the defendants and/or their counsel. Three witnesses for the plaintiffs took the stand and tendered evidence supporting the plaintiffs' claim. After deliberation, the High Court decided in favour of the plaintiffs and awarded them a sum of RM7.1 million as general damages, 10% of RM7.1 million as aggravated damages, interest at 8% per annum on RM7,810,000 from date of filing the writ to date of realisation and costs, all to be paid by the 1st and the 3rd defendant.

[2] The defendants' solicitors became aware of this on the evening of the judgment through a television news broadcast. They immediately applied, the next day, to set-aside the judgment under O. 35 r. 1 of the Rules of the High Court. This application was heard and dismissed by the High Court on 28 January 2008. On the very same day, the defendants filed a notice of appeal against the decision of the High Court handed down on 13 January 2008 (Appeal No. D-01-21-2008) and another against the decision of the learned judge in refusing to set aside the default judgment ie, the decision handed down on 28 January 2008 (Appeal No. D-01-22-2008).

[3] The defendants applied to consolidate these two appeals but was rejected by this court which ordered these two appeals be heard one after the other. Accordingly, we heard Appeal No. D-01-22-2008 first.

Preliminary Objection

[4] Before we dwell into the substantive appeal, we have to dispose off a preliminary objection raised by the plaintiffs in encl. 15A. In this application, the plaintiffs requested us to strike out Appeal No. D-01-21-2008 on the ground that the defendants had elected to appeal against the decision on the refusal of the High Court to set aside the default judgment. In short, they are contending that since the defendants have filed an appeal against the decision to set aside the default judgment, the defendants are estopped from pursuing with their appeal against the decision of the High Court for entering judgment against them.

[5] In support of this proposition, the plaintiffs' counsel cited to us a number of authorities. We need not deal with them all since they relate to the same principle except to highlight one case *Annie Quah Lay Nah v. Syed Jafer Properties Sdn Bhd & Ors and Another Appeal* [2007] 1 CLJ 1 which says:

> If one of the parties to litigation is faced with two mutually exclusive alternatives and he elects to pursue one then he will be estopped from retreating from the position he has adopted by his election.

[6] The defendants on the other hand insisted that they have the right to pursue both appeals. Their Appeal No. D-01-22-2008 arose out of their application made under O. 35 r. 2 of the Rules of the High Court (RHC) which says:

> (1) Any judgment or order obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party, on such terms as it thinks just.
>
> (2) An application under this rule must be made within 7 days after the trial.

[7] After the High Court has refused to set aside the judgment in default made pursuant to O. 35 r. 2 RHC, according to the defendants this order is appealable to the Court of Appeal by virtue of s. 67 of the Courts of Judicature Act which provides:

> The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

[8] Similarly, in respect of the default judgment made on 13 January 2008, it is again appealable to the Court of Appeal under this same provision – s. 67(1) of the Courts of Judicature Act.

[9] The proposition of a party who has elected to pursue with one of the two exclusive alternatives is estopped from retreating from the position he has adopted by election is based on a much cited passage in the authoritative text by Spencer, Brown and Turner on *"The Law relating to Estoppel by Representation"* which was reproduced in *Annie Quah Lay Nah v. Syed Jafer Properties Sdn Bhd & Ors and Another Appeal (supra)* as well as the Privy Council case of *Meng Leong Development Pte Ltd v. Jip Hong Trading Co Pte Ltd* [1985] 1 CLJ 20; [1985] CLJ (Rep) 8 which states:

> The last of the four fields in which the doctrine under discussion may be observed in operation, and, perhaps, the most important and interesting of them all, because yielding the greatest variety of illustrative examples, is the conduct of litigation, in the course of which it very frequently happens that a party litigant is confronted with the necessity of immediately making a definite choice between two possible courses of action which are mutually exclusive. Whenever this occurs, the general rule of estoppel by election comes into play: that is to say, if by words, or (as is almost invariably the case) by conduct or inaction, he represents to the other party litigant his intention to adopt one of the two alternative and inconsistent proceedings or positions, with the result that the latter is thereby encouraged to adopt or persevere in a line of conduct which he otherwise would have abandoned or modified, or (as the case may be) to change tactics from which he otherwise would never have deviated, the first party is estopped, as against his antagonist, from resorting afterwards to the course or attitude which, of his free choice, he has waived or discarded.

[10] One would observe from the above that for this principle of estoppel to apply there must first be an election made by one party and responded by the other who was encouraged by this election to adopt or persevere a line of conduct which he otherwise would have abandoned or modified or he has changed his tactics which he would not have adopted if not for the election. In short, there must be a positive act of election corresponded by a reaction from the other side to the act. But from the facts as disclosed in our instant case, we found no evidence that the defendants had made any election in the first place. They have proceeded with the two appeals simultaneously.

A And neither did we find any evidence that the plaintiffs were encouraged by any election made by the defendants to alter their conduct of this case. The plaintiffs in fact were prepared to take on the defendants in both the appeals.

B **[11]** Learned counsel for the plaintiffs however brought to our attention that there is the Court of Appeal decision in *Yogananthy A S Thambaiya lwn. Idris Osman* [2006] 1 CLJ 430 which ruled otherwise and the facts are on all fours as the present case. There the Court of Appeal said:

C

> Memandangkan permohonan perayu untuk menghidupkan semula tuntutan dan mengenepikan penghakiman tersebut beikutan A. 35 kk. 1 dan 2 KMT yang telah digunapakainya, rayuan oleh perayu disini (yang cacat) terhadap penghakiman tersebut adalah tidak tertempat, salah tanggap, salah faham dan merupakan satu
> D penyalahgunaan proses mahkamah sebab penghakiman tersebut tidak boleh dirayu kerana ia tertakluk kepada A. 35 kk. 1 dan 2 KMT, sebab beliau dan peguamnya tidak hadir di mahkamah semasa perbicaraan kes tersebut yang telah ditetapkan pada 16 Oktober 2000.

E Translated into English:

> In view of the appellant's applications for reinstatement and to set aside the judgment under Order 35 rule 1 and 2 RHC, this appeal (which is defective) in respect of the said judgment is the
> F wrong presumption, misconceived and an abuse of process because the said judgment cannot be appealed upon since it is based on Order 35 rule 1 and 2 RHC and also because they and their counsel did not appear in Court at the day of trial which was fixed on 16th October 2000.

G **[12]** Before we proceed to analyse this judgment, let us examine the facts in *Yogananthy A S Thambaiya v. Idris Osman (supra)*. On 16 October 2000, the High Court has dismissed the plaintiff's claim on the failure of the plaintiff and/or his counsel to turn up in court for the hearing which was fixed for 16 and 17 October
H 2000. The High Court then proceeded to hear the defendant's counterclaim. Evidence from the defendants' two witnesses was adduced to support the counterclaim. At the end of the trial, the plaintiff's claim was struck out and judgment entered for the defendant's counterclaim. On 17 October 2000, the plaintiff filed
I a notice under O. 35 r. 1 and 2 RHC to set aside the order given on 16 October 2000. Then on 20 October 2000, the plaintiff applied to stay the execution on the default judgment. And on

14 November 2000, the plaintiff filed an appeal against the default judgment given on 16 October 2000. Thus, before the Court of Appeal there were three applications:

1. The plaintiff's application to file appeal record out of time.
2. The plaintiff's application to stay execution (obviously the High Court must have refused the plaintiff's application for stay).
3. The defendant's application for an order that the plaintiff's appeal against the order given on 16 October 2000 be struck out as it abused the court's process.

[13] In respect of the last application, the Court of Appeal has this to say:

> Perlu dinyatakan di sini sekali lagi bahawa asas permohonan respondent di Lampiran 18(a) ialah bahawa rayuan yang dibawa oleh perayu adalah merupakan satu penyalahgunaan proses mahkamah kerana perayu telahpun membuat permohonan di Mahkamah Tinggi mengikut A. 35 kk. 1 dan 2, Kaedah-Kaedah Mahkamah Tinggi 1980, memandangkan beliau dan peguamnya tidak menghadiri mahkamah pada 5 Disember 2000 terhadap keputusan tersebut yang telah diberikan pada 16 October 2000 telah difailkan di luar masa seperti yang ditetapkan oleh A. 12 Kaedah-Kaedah Mahkamah Rayuan 1994 ...
>
> Notis rayuan perayu sepatutnya difailkan dalam masa satu (1) bulan dari 16 Oktober 2000, iaitu sebelum 15 November 2000. Oleh kerana ianya difailkan selapas masa yang ditetapkan untuk rayuan, iaitu pada 5 Disember 2000, adalah jelas bahawa rayuan tersebut telah tidak dibawa secara teratur ke hadapan mahkamah ini.

Translated into English:

> To repeat, the basis for the respondents' application in enclosure 18(a) is that the appeal by appellant is an abuse of process of the Court in that appellant has already filed an application in the High Court under Order 35 rule 1 and 2 RHC 1980 due to their absence as well as their counsel in court on 16th October 2000. The notice of appeal which was filed by the appellant on 5th December 2000 was against this judgment given on 16th October 2000 is out of time by virtue of Order 12 of the Rules of the Court of Appeal 1994 ...

A This Notice of Appeal ought to be filed in one month from 16 October 2000 which is before 15th November 2000. Because it was filed out of time on 5th December 2000, this appeal is irregular before this Court.

B **[14]** It was based on this ground ie, that the appeal filed against the case proper was out of time that the passage cited by the defendants' counsel above was made. The Court of Appeal in *Yogananthy AS Thambaiya v. Idris Osman (supra)*, in our view, did not lay down any general principle that once an appeal against an order of refusal to set aside made under O. 35 r. 1 and 2 RHC C was filed an appeal against the default judgment cannot be maintained. It was on the ground that the appeal against the default judgment was defective that the Court of Appeal dismissed the appeal; not for the filing of a concurrent application for re-instatement.

D

[15] Further, we would like to point out that in *Yogananthy AS Thambaiya v. Idris Osman (supra)* the appeal against the decision for the refusal to set aside the default judgment was filed much earlier than the appeal against the default judgment. This may E have created an impression that an election has been made by the appellant resulting in the appellant being estopped. But in our instant case, both appeals were filed simultaneously creating no notion to the plaintiffs that an election was made by the defendants in not pursuing with one course of action in preference F to another exclusive alternative.

[16] To conclude on this issue, we would like to remind that this principle of estoppel, being equitable in nature should only be used where justice dictates and should only be applied "according G to the facts and circumstances of each particular case and its operation depends much upon the conduct of the parties" – see *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305. And, based on the facts as stated above, we found no merit in this preliminary objection and dismissed it accordingly.

H

Appeal Proper & Principles To Be Applied

[17] We shall now return to the appeal proper. We start by stating that in an application to set aside a default judgment due to non appearance of a party, a distinction must be made I between one where such judgment was obtained without a trial having proceeded and one which did. In the former, which covers

default due to a failure to file an appearance after the writ was served or default of defence, the principle in *Evans v. Bartlam* [1937] AC 473 applies. It is basically:

> unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have power to revoke the expression of its coercive powers where that has only been obtained by a failure to follow any rules of procedure.

And in *Barnes v. Kondel* [1971] 1 Lloyds Rep @ 444, Lord Denning MR expanded to say that a "defence on the merits" means a defence which discloses an arguable and triable issue. In short, the court, as a general rule, will not set aside such default judgment unless the defendant can establish a defence on merit. This seems to be the predominant feature against the explanation for the default or for any delay in applying to set it aside.

[18] But when a judgment is entered after a trial has proceeded a different set of rules applies. In the English Court of Appeal case of *Shocked & Anor v. Goldschmidt & Ors* [1998] 1 All ER 375, the major factors to be considered to set aside such default judgment differ from that in *Evans v. Bartlam* in the order of priority and prominence. The reason for the absence of the party at the trial has become the "predominant consideration" over that of a defence on merit. This can be observed from the judgment of Leggatt LJ when he said:

> (1) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision. (2) Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing. (3) Where the setting aside would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are strong reasons for doing so. (4) The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success. (5) Delaying in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it. (6) In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion his favour. (7) A material consideration is whether the successful party would be prejudiced by the judgment

> being set aside, especially if he cannot be protected against the financial consequences. (8) There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short.

[19] Our courts have adopted this principle in *Abdul Rafar bin Maimunni & Anor v. H.M. Latiff KM Haneefa* [2008] 1 LNS 157 and *Ng Chek Kiam & Anor (Seng Heng Wholesale Fruit Dealer) v. Best Fruits Sdn Bhd* [2006] 1 LNS 367. We are of the view that this represents the current state of the law when dealing with an application to set aside a default judgment where a trial has proceeded and we shall apply this to the facts of this case.

Factor: Reasons For The Absence

[20] As reason for the defendants' absence has become the predominant consideration, we shall first examine the excuse rendered by the defendants for failing to turn up in court for the hearing. According to the defendants' counsel's submission the excuse was:

> The solicitor who had conduct of the matter, namely one Munir Shah bin Mohd Husan, had resigned from the firm of Wong Lu Peen & Tunku Alina (the defendants' solicitors). However, prior to the date of his resignation from the firm in December 2008, the date of the hearing was not entered into the firm's diary by the said lawyer. As such, no solicitor for the Appellants was present at the Kota Bharu High Court on 13.01.2008 when the above matter was fixed for trial.

[21] This excuse offered by the defendants seem to lay the blame on an employee engaged by the defendants' solicitors who failed to enter into the diary the hearing date. But an employer is responsible for the action of his employee and so is the conduct of the defendants' solicitors binding the defendants. Undoubtedly, such callous act of the defendants' solicitors speaks very poorly of them. And such excuse has for the last decade become a common feature for an applicant to convince the court into granting him a retrial. But from authorities (*Mohd Yusof Mohamad v. Electrolux Home Centres Sdn Bhd* [1999] 2 CLJ 866; *Asia Commercial Finance (M) Bhd v. Pasadena Properties Development & Ors* [1990] 2 CLJ 961; [1990] 1 CLJ (Rep) 606) such excuse has not been tolerated. This has in fact irked the court to remark in *Lim Soh Wah & Anor v. Wong Sin Chong & Anor & Another Appeal* [2001] 2 CLJ 344:

> One of the fundamental duties of a solicitor is to diarize his cases, keep his client informed of the diarized dates and prepare the case with his client. The present instance is a case where there was a failure to discharge this rather fundamental obligation. As a result the clients suffered.

[22] We would further like to add that if the proprietors of the defendants' solicitors' firm were indifferent or had little interest in managing their firm properly by failing to devise a system to monitor and check on whether the duties or instructions given to its employee were carried out then this would amount to a deliberate act or defiance of a court order if such order were given to such employee and not complied with. This is no longer a mistake or an accident especially in this modern world of technology, where systems for monitoring compliance of duties imposed on staff and other members of an organisation are readily available in the market and have reached a sophisticated level. Poor management and the lack of care taken to record a hearing date can no longer be tolerated.

[23] Aside from the above, the plaintiffs have also adduced evidence, which is not rebutted by the defendants, that they have sent by letter of reminder to the defendants' lawyer of the hearing date. Though Encik Munir may have been careless in not entering this date into the diary such notification would have alerted other members in the defendants' solicitors' firm of the forthcoming event. And if they chose to ignore it then their reason for the absence of the defendants is inexcusable.

[24] We would like also to mention that against the present judicial policy of strict adherence to hearing dates once set this excuse of the defendants attracts minimum tolerance from the court. Wastage of judicial time and resources undermines the efforts of the Judiciary's to eradicate the backlog of cases faced by the courts.

Factor: Real Prospect Of Success

Release Of A Joint Tortfeasor

[25] We shall now move to the next factor for consideration: whether the defendants have any real prospect of success in their defence if the default judgment is set aside. The defendants' counsel has submitted that the High Court has erred in five areas of the law and this is sufficient to overturn the decision given on 13 January 2008. The first relates to the plaintiffs' cause of action

of conspiracy by the 1st, 2nd and 3rd defendant to defraud the plaintiffs. According to him, this cause of action cannot be maintained against the 1st and 3rd defendant without the 2nd defendant who passed away before the trial and no substitution of him as party to the action was made by the plaintiff. This is based on the proposition that if one joint torfeassor is dead or released by the plaintiff the claim against the remaining tortfeasors is extinguished. For support of this, a passage from the judgment of Salmon J in *Cutler v. MacPhail* [1962] 2 All ER 292 was cited:

> The points raised on release are extremely interesting and by no means easy. The principle is quite plain, that if there is a release of one joint torfeasor, the cause of action against all the other joint tortfeasors is extinguished; on the other hand, if there is merely an agreement not to sue one of several joint tortfeasors, the cause of action does not die and the other tortfeasors can properly be sued.

[26] In order to fully appreciate this argument, it is necessary for us to disclose briefly the plaintiffs' claim. The plaintiffs are 354 FELDA settlers in a particular FELDA scheme in the State of Kelantan. The 1st defendant is a statutory body operating such scheme throughout the country. The 2nd defendant was the manager of the 1st defendant in this particular scheme. The 3rd defendant operates a palm oil mill. By an agreement between the plaintiffs and the 1st defendant, all oil palm fruits harvested from the plaintiffs' scheme were sold to the 3rd defendant to be processed and profits from this sale would be divided between the plaintiffs and the 1st defendant. In the year 2001, the plaintiffs discovered that the 1st, 2nd and 3rd defendant either jointly or severally had deceived and/or conspired to deceive the plaintiffs in the sale of these oil palm fruits to the 3rd defendant resulting in a loss to the plaintiffs; thus this action by the plaintiffs. The defendants of course denied this claim. Sometime in the year 2006, before the trial commenced, the plaintiffs heard a rumour that the 2nd defendant has passed away. This prompted the plaintiffs' solicitors to write a letter to the defendants' solicitors for confirmation. In it the plaintiffs also expressed their willingness to withdraw their claim against the 2nd defendant if this was true. There was no response from the defendants or their solicitors. As the case progressed, the defendants' solicitors made no reference at all to the death of the 2nd defendant. Eventually, when the High Court delivered its decision on 13 January 2008, the award handed down in favour of the plaintiffs was only against the 1st and 3rd defendant.

[27] Rebutting the need for a substitution of the deceased 2nd defendant in this proceedings, the plaintiffs' counsel highlighted to us two passages from the *"Malaysian Court Practice, High Court"* 2007 edition:

> If a sole defendant dies and the cause of action is one that survives, the plaintiff may obtain an order to continue the proceedings as against the executor or administrator of the deceased defendant or such executor or administrator may himself apply to be substituted or added as defendant, but unless and until such executor or administrator is added, the action cannot continue: *Chockalingam Chetty v. Amin* [1933-34] FMSLR 130; *Oh Jin Ghee & Ors v. Abdul Hameed & Ors v. Cheng Chiew Chin* [1998] 2 SLR 615, HC.
>
> Where one of two or more defendants dies, if the defendants are jointly liable, the liability continues against the survivors and there is no strict necessity to add the personal representative of the deceased defendant. If all dies, the proceedings should be continued against the representative of the last surviving defendant. If the defendants are jointly and severally liable the action may be continued against the survivors or against the representative of the decease defendant and the survivors.

[28] To fortify this proposition, plaintiffs' counsel cited to us the judgment of the High Court in *Tajjul Ariffin Mustafa v. Heng Cheng Hong* [1991] 2 CLJ 1212; [1991] 4 CLJ (Rep) 56 which says that procedural rule does not negate the rule of substantive law and that each joint tortfeasor is liable for the entire damage resulting from their tortious act.

[29] Undoubtedly, the causes of action mounted by the plaintiffs in this case are tortious in nature. They are fraud and conspiracy to defraud. But in the case of fraud, the plaintiffs have claimed against the defendants jointly and/or severally. Thus each of the defendants is individually liable to the plaintiffs. In such situation there can be no question of the 1st and 3rd defendant being released by the plaintiff on account of the death of the 2nd defendant.

[30] In the cause of action for conspiracy, we agree that all defendants are joint tortfeasors. But when one of them dies, the law, as it now stands, says that an action against the surviving tortfeasors continues to subsist without the strict necessity to substitute the deceased defendant. In short, the action continues

against the remaining tortfeasors. Going by this proposition, the 1st and 3rd defendant remain liable to the plaintiffs; they have not been discharged.

[31] Concerning whether there was a release given by the plaintiffs to the deceased 2nd defendant, we are of the view that though such desire was expressed it was not an act of withdrawal. Besides, when the defendants' solicitors failed to respond to the plaintiffs' request for confirmation on the death of the 2nd defendant such intention to release naturally expires. We have also scrutinised the notes of evidence of the High Court and found no record that the plaintiffs have requested to withdraw their claim against the 2nd defendant. It was the High Court's own discretion to refuse awarding any damages against the 2nd defendant. Such order of the court cannot be considered as an act of the plaintiffs. For these reasons we hold the view that this contention of the defendants has no merit.

Failure To Prove Damages Suffered

[32] The next point raised by the defendants is that the High Court has applied the wrong principle when awarding general damages and such award is unsupported by documentary evidence.

[33] Before we consider these allegations we reproduce a translation of what the High Court ruled.

> PW3 then gave evidence on the calculations of the losses sustained by the Plaintiffs due to the deception and conspiracy by the Defendants. According to PW3 all 354 Plaintiffs sustained losses of RM7,146,291.00 in total. The basis of the calculation is the difference in the price of fruit per tonne which ought to have been paid to the settler multiplied by the total number of tonnes of fruit actually sold to the Felda factory. The formula is the actual price of palm fruit per tonne according to the quality of the fruit less (-) the price of palm fruit per tonne according to the grade valuation by the Felda factory multiplied (x) by the total volume.
>
> The grade of the palm fruit valued by the Felda factory was in the region of KPG 17.5%. The price per tonne of palm fruit was RM250. KPG 1% is equivalent to RM14.28 (250/17). The grade valued by the Felda factory was KPG 17.5%. The KPG ought to have been graded as 21%. The difference in the KPG which ought to have been paid to the Plaintiffs is 21% - 17.5% = 3.5%. Total loss for the year 1997 is 56.27 x 21,166.67 -

RM1,191,048.52 (56.27 is the price difference. 21,166.67 is the volume in tones). The loss incurred by the Plaintiffs for the years 1997-2002 is RM 1,191,048.52 x 6 years = RM7,146,291.12.

The Court finds that the sum of the calculations done by PW 3 simple, clear and correct.

[34] According to the defendants, the correct principle applicable for consideration of this matter is stated in *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635, *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15, *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1994] 1 CLJ 19. And the statutory provision governing this is ss. 74 and 75 of the Contracts Act.

[35] We regret to inform that two out of the three cases and the statutory provisions cited apply only to damages for breach of contract. The case before us is one of tort. The other case *(Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd)* involves a cause of action for trespass and nuisance which is of very little assistance to us.

[36] It is our view that for a claim based on fraud and conspiracy to defraud, the plaintiffs should be entitled to the loss suffered as the result of the deprivation of their income or profit caused by the wrong committed by the defendants after taking into account the foreseeability factor – see para 1138 *Halsburys Laws of England,* 4th edn, vol 12. Here the plaintiffs' third witness has given creditable and uncontradicted evidence on how the amount of losses was arrived at and this has been accepted by the High Court. Though each plaintiff was not called to testify on their respective loss, we see no reason for this requirement since in this FELDA scheme all the plaintiffs have agreed to sell their crops to the 3rd defendant and the profits derived therefrom shared collectively by them with the 1st defendant.

[37] The defendants also complained of the absence of documentary evidence to support a finding of actual loss suffered by the plaintiffs. We, however, fail to appreciate this in the face of the adequate and comprehensive oral testimony by PW3 who has systematically and methodically worked out the amount of losses. For this we are not inclined to disturb the finding of the trial judge who has applied the correct principles in law in coming to his finding which is substantiated by cogent evidence.

Exemplary Damages

[38] The amount of exemplary damages awarded by the High Court based on 10% of RM7,146,291 is considered excessive by the defendants and according to them this was made against established principles. Basically, the law sets down that this category of damages, if awarded, should be moderate and the resources of the parties must be taken into account. Other factors to be considered are the quantum of compensatory award as well as the conduct of the parties right down to the time of the judgment. The gravity of the wrong is also another item to be taken into account. These are spelled out in *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd (supra)*.

[39] On the conduct of the party we would like to highlight that the role of the 1st defendant, as a statutory body, was to assist the plaintiffs in raising their standard of living. Instead, we have here a situation of the first defendant cheating the plaintiffs. In a position of authority over the plaintiffs in the allotment of land in the said scheme the 1st defendant had, after this suit was filed, threatened to evict the plaintiffs from the scheme for pursuing this action. Such intimidation weighs against the first defendant. The 3rd defendant is no better since they are associated with or is part of the 1st defendant. Given these circumstances and having taken into account all other relevant factors into consideration, we are of the view that the trial judge's award of this amount is justified.

Standard Of Proof

[40] The next contention of the defendants is that the High Court has applied the wrong standard of proof. In a cause of action for fraud and conspiracy to defraud, according to the defendants, the standard of proof is beyond reasonable doubt but in this instance the High Court has applied the balance of probabilities.

[41] Having perused the High Court's judgment given on 13 January 2008, we find this allegation of the defendants incorrect. What the High Court said was this:

> Mahkamah menggunakan beban bukti imbangan kebarangkalian. Namun begitu jika Mahkamah menggunakan beban bukti melampaui keraguan yang munasabah sekalipun, Mahkamah tetap akan membuat keputusan yang sama. Keputusan kes Mahkamah Persekutuan *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ

> 229 membenarkan sedemikian. Di samping itu suka ditekankan di sini bahawa menurut amalan siasatan pihak polis, mereka tidak akan meneruskan siasatan fraud yang melibatkan kes sivil begini.

Translated:

> This Court has used the balance of probabilities as the standard of proof. Even though the Court uses standard of proof of beyond reasonable doubt it would still arrive at the same decision. The Federal Court authority of *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229, allows this. Besides it must be stressed that following police investigation into this case, the police were of the opinion that this is a civil case.

[42] In *Yong Tim v. Hoo Kok Chong (supra)* the Federal Court laid down the standard of proof for fraud in civil proceedings as beyond reasonable doubt. However this case made no reference to an earlier authority by the same court in *Ang Hiok Seng v. Yim Yut Kiu* [1997] 2 MLJ 45 where the head notes reads:

> Whether the allegation of fraud in civil proceedings concerns criminal fraud such as conspiring to defraud, misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt and not on the balance of probabilities. An allegation of criminal fraud in civil or criminal proceedings cannot be merely based on suspicion. However where the allegation of fraud is entirely founded on civil fraud and not criminal conduct or offence, a balance of probability is applicable.

[43] Faced with this, we understand the predicament of the High Court on the standard of proof to be applied. To resolve this, the High Court declared that even if proof beyond reasonable doubt is applied, its decision would still be the same. This is a clear indication that the High Court has considered and applied the higher standard of proof in coming to a conclusion that the defendants are liable to the plaintiffs.

Admission Of Documents Not Previously Agreed Upon

[44] The defendants claimed that the High Court had admitted oral and documentary evidence without regard to whether they are admissible. In support of this, the case of *Chong Khee Sang v. Pang Ah Chee* [1983] 1 LNS 57 was cited where Shankar J declared that documentary evidence tendered must be proved. Though the defence have not identified specifically to us the impugned documents and oral evidence they claimed were not proved, the

A submission of the defendants tends to point towards the plaintiffs' "ikatan dokumen tambahan" (the bundle of additional documents). This bundle, according to the defendants was not previously agreed upon by them to be admitted without proof.

B **[45]** We find this assertion unsubstantiated. These documents were admitted by the court when they were tendered by the plaintiffs during the trial. Once admitted they are considered evidence. As for oral evidence, we find them properly admitted by the court.

C

Factor: No Delay In Applying To Set Aside

[46] We do not deny the fact that the defendants had taken prompt and immediate action to file this application to set aside the judgment in default. This, however, is merely one of the
D factors to be considered. But in the light of the very weak excuse given for the absence of the defendants in court on the day set for trial and having no real prospect of success in their defence, this sole act of the defendants in seeking prompt redress pales in significance. Further, it is a public policy that there should be
E finality in an action rather than having to engage the court to conduct two trials instead of one.

Conclusion

F **[47]** For reasons above, by way of a majority, this appeal should be dismissed with costs. Deposit for this appeal to the plaintiffs towards account of taxed costs.

Abdul Malik Ishak JCA (Dissenting):

G **The Facts**

[48] The appellants were the defendants in the High Court Civil Suit No: 22-85-2002.

[49] While the respondents were the plaintiffs in the High Court
H Civil Suit No: 22-85-2002. Altogether, there were a total of 354 plaintiffs in this suit. And the suit was not a representative action. I have more to say of this later.

[50] The Civil Suit No: 22-85-2002 was fixed for hearing before
I the learned judge of the High Court for two days, namely, on 13 January 2008 and 14 January 2008.

[51] The solicitor for the appellants defendants who had conduct of the matter at the High Court was one Munir Shah bin Mohd Husan (hereinafter referred to as "Munir"). But, unfortunately, Munir had not only resigned from the law firm of Messrs Wong Lu Peen & Tunku Alina on 19 December 2007 but he had also failed to enter the hearing dates on the master diary with the consequent result that neither the appellants defendants nor their counsel turned up on the date of hearing before the learned judge of the High Court.

[52] On 13 January 2008, the hearing before the learned judge of the High Court proceeded in the absence of the appellants defendants and their solicitors. At the end of the hearing on 13 January 2008, the learned judge of the High Court gave judgment in favour of the respondents plaintiffs and awarded general damages in the sum of RM7.1 million, and aggravated damages calculated at 10% of RM7.1 million amounting to RM710,000 together with interest at 8% per annum on RM7,810,000 from the date of filing the writ to the date of realisation and costs which cumulatively had to be paid by the first appellant defendant and the third appellant defendant (hereinafter referred to as the "judgment").

[53] The appellants defendants' solicitors only became aware of the said judgment on the very night of 13 January 2008 when the matter was broadcasted nationwide on national television.

[54] Acting swiftly, the appellants defendants' solicitors immediately filed on 14 January 2008 an application to set-aside the judgment in default of appearance pursuant to O. 35 r. 1(2) of the Rules of the High Court 1980 ("RHC") on a certificate of urgency.

[55] On 20 January 2008, the learned judge of the High Court heard the application to set aside the judgment in default of appearance.

[56] On 28 January 2008, the learned judge of the High Court dismissed the appellants defendants' application to set aside the judgment in default of failing to appear at the trial.

[57] On the very same day – and that would be on 28 January 2008, the appellants defendants filed the following documents at the High Court registry:

A (a) a notice of appeal against the whole decision of the learned judge of the High Court *vide* Civil Appeal No: D-01-21-2008 that was delivered on 13 January 2008 (hereinafter referred to as the "first appeal"); and

B (b) a notice of appeal against the whole decision of the learned judge of the High Court in dismissing the appellants defendants' application to set aside the judgment in default of appearance *vide* Civil Appeal No: D-01-22-2008 that was delivered on 28 January 2008 (hereinafter referred to as the C "second appeal").

[58] On 22 February 2008, the appellants defendants filed an application to consolidate both these two appeals – the first appeal and the second appeal, but another panel of this court dismissed the appellants defendants' consolidation application and D directed that both the appeals be heard one after another.

The Respondents Plaintiffs' Application In encl. 15a

[59] By this encl. 15a, the respondents plaintiffs sought to strike E out the first appeal by contending that the appellants defendants had made an election to proceed with the second appeal and was thus estopped from pursuing with the first appeal.

[60] I find myself in complete agreement with the judgment of F my learned brother James Foong Cheng Yuen, FCJ in his excellent treatment and approach to encl. 15a. His Lordship has admirably examined the law in the context of the facts of the present case and we unanimously dismissed encl. 15a forthwith. As a matter of law there are no principles of law that require the appellants G defendants to be put to an election of their rights because both these two appeals are in respect of different matters, issues and questions of law.

[61] The burden falls on the respondents plaintiffs to show that the first appeal should be struck out by showing that either the H grounds of the first appeal are not capable of being argued or that the first appeal are frivolous, vexatious or an abuse of process. Only in "clear and obvious cases" that this panel will strike out the first appeal. In the words of Glidewell LJ in the case of *Burgess v. Stafford Hotel Ltd* [1990] 1 WLR 1215, at p 1222:

I

> The jurisdiction to make orders striking out notices of appeal is one that is just as capable of abuse as is the power to put in hopeless notices of appeal. In my view the power to strike out should be confined to clear and obvious cases.

[62] The decisions of the learned judge of the High Court on 13 January 2008 and on 28 January 2008 are appealable. Section 3 of the Courts of Judicature Act 1964 defines the word "decision" to mean "judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties". It cannot be denied that the decision of the learned judge of the High Court that was handed down on 13 January 2008 finally disposed of the appellants defendants' rights before the High Court and that would entitle the appellants defendants to file in the notice of appeal which they did.

[63] Section 67(1) of the Courts of Judicature Act 1964 gives jurisdiction to this panel to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provision of this sub-section or any other written law regulating the terms and conditions upon which such appeals shall be brought.

[64] The decisions of the learned judge of the High Court on 13 January 2008 and on 28 January 2008 are not caught within the ambit of s. 68 of the Courts of Judicature Act 1964 in that they are appealable matters which can be heard by this panel.

[65] In relation to the second appeal, I have this to say. It relates to the appellants defendants' application to set aside the judgment in default due to the absence of the appellants defendants and their solicitors and it is an interlocutory matter which finally disposed of the appellants defendants' rights before the High Court. So, the only remaining recourse for the appellants defendants would be to seek a review of the decision of the learned High Court judge by way of an appeal to the Court of Appeal by filing the required notice of appeal on 28 January 2008. That being the case, in my judgment, the requirements of s. 3 of the Courts of Judicature Act 1964 read together with s. 68 of the same Act have been complied with.

[66] Similar words like "judgment, sentence, or order" that appear in s. 307(1) of the Criminal Procedure Code (Act 593) also appear in s. 3 of the Courts of Judicature Act 1964 and it was held to mean in the case of *Melab bin Su v. Public Prosecutor; Cheak Yoke Thong v. Public Prosecutor* [1984] 1 LNS 29 as a decision which would "finally dispose of the rights of the accused persons" and this was approved by way of an obiter by the Supreme Court in the case of *Ang Gin Lee v. PP* [1991] 2 CLJ 857; [1991] 1 CLJ (Rep) 13.

[67] The marginal note to s. 68 of the Courts of Judicature Act 1964 refers to "non-appealable matters" and it prescribes what the matters are which may not be brought before the Court of Appeal. Section 68(1)(a) of the Courts of Judicature Act 1964 makes reference to the "amount of the claim" and the "value of the subject matter of the claim" which cannot be less than RM250,000 (see *Yap Fook Cheong & Anor v. Burkill (Malaya) Sdn. Bhd. & Anor* [1991] 3 CLJ 1711; [1991] 1 CLJ (Rep) 499, SC which was judicially considered by the Federal Court in the case of *Yai Yen Hon v. Teng Ah Kok & Sim Huat Sdn Bhd & Anor* [1997] 2 CLJ 68). In my considered view, the correct approach to understand and apply s. 68 of the Courts of Judicature Act 1964 is to read sub-section (1)(a) as the dominant provision because the real purpose or object of s. 68(1)(a) of the said Act is to prevent cases involving less than RM250,000 to be brought to the Court of Appeal without leave *(Yap Fook Cheong & Anor v. Burkill (Malaya) Sdn. Bhd. & Anor (supra))*. Here, the quantum was more than RM7.1 million and it was certainly appealable without the need to obtain leave of the Court of Appeal.

[68] I must reiterate that, as a matter of law, the decisions of the learned High Court judge on 13 January 2008 and on 28 January 2008 are appealable. These two appeals are distinct and different from one another. The first appeal relates to the merits of the entire suit whilst the second appeal relates to the dismissal of the appellants defendants' application to set aside the judgment in default of appearance. I cannot help but make the following observations:

(a) in filing the first appeal and the second appeal there was no issue of abuse of the process of the court nor have the appellants defendants waived or relinquished their rights to appeal to the Court of Appeal against both decisions of the learned High Court judge by way of separate appeals; and

(b) that this was not a plain case warranting a striking out of any of the appeals.

[69] The filing of encl. 15a by the respondents plaintiffs were entirely misconceived and ought to be struck out in limine for the following reasons:

(i) on 7 March 2008, the respondents plaintiffs filed a notice of motion to strike out civil appeal no: D-01-21-2008 in another appeal and that would be civil appeal no: D-01-22-2008;

(ii) on 12 May 2008, the Court of Appeal dismissed the notice of motion to strike out civil appeal no: D-01-21-2008 that was filed in civil appeal no: D-01-22-2008;

(iii) the respondents plaintiffs' striking out application was clearly subject to the doctrine of *res judicata* and was tantamount to an abuse of process; and

(iv) the respondents plaintiffs' application to strike out was clearly a ploy to circumvent the determination of the civil appeal no: D-01-21-2008 on its merits and that the proper procedure was for the respondents plaintiffs to oppose the appeal proper rather than filing an interlocutory application to strike out the notice of appeal.

[70] For all these reasons, encl. 15a ought to be dismissed, and we so order accordingly.

The Appeal Proper

[71] I begin by making reference to O. 35 r. 1(2) of the RHC which states as follows:

> If, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counterclaim in the absence of that party.

[72] Now, when one party fails to appear, just like the facts which prompted the first appeal, the High Court may proceed with the trial in the absence of the party. But the party who appears before the High Court, just like the respondents plaintiffs, will have to prove their case on any issue which the respondents plaintiffs bear the burden of proof. In short, the respondents plaintiffs will have to prove their claim (*Liew Geok Lan (F) v. John Loh* [1993] 3 CLJ 158; *Barker v. Furlong* [1891] 2 Ch. 172 at 179; and *Shaharuddin bin Abdul Rahman v. Satisah Ismail Sdn. Bhd.*

A [1982] 1 LNS 29). And once the respondents plaintiffs have proved their case they are entitled to the reliefs which they claim and such other reliefs which are consistent with their claim (*Stone v. Smith* [1887] 35 Ch. D 188; and *Kingdon v. Kirk* [1888] 37 Ch. D 141).

B

[73] It must emphasised that the burden of proof lies on the respondents plaintiffs to prove their claim notwithstanding the absence of the appellants defendants or their counsel.

C **[74]** It must be borne in mind that where judgment is given in the absence of either party, the absent party, like the appellants defendants here, may apply to set it aside under r. 2(1) of O. 35 of the RHC.

[75] I will now make reference to O. 35 r. 2 of the RHC which D states as follows:

> **Judgment, etc, given in absence of party may be set aside (Order 35 rule 2)**
>
> (1) Any judgment or order obtained where one party does not E appear at the trial may be set aside by the court, on the application of that party, on such terms as it thinks just.
>
> (2) An application under this rule must be made within 7 days after the trial.

F **[76]** Here, there was promptitude on the part of the appellants defendants in filing an application to set aside the judgment in default of appearance pursuant to O. 35 r. 2(2) of the RHC.

[77] It is quite obvious that r. 2 of O. 35 of the RHC complements G r. 1(2) of O. 35 of the RHC. It empowers the court, here it would be the High Court, on the application of the party in default, to set aside the judgment or grant an order on such terms.

H **[78]** Of course, any judgment or order given in the absence of a party to the suit – here it would be the appellants defendants, may be set aside at the discretion of the High Court who will examine the reasons for the party's absence. According to the case of *Burgoine v. Taylor* [1878] 9 Ch. D 1 at 4, where judgment was I entered due to the solicitor's absence mainly because of the solicitor's negligence in failing to look at the correct hearing list, the judgment may be set aside. And when that happens, according to the case of *Cockle v. Joyce* [1877-78] 7 Ch. D 56, the terms in

setting aside the judgment are usually worded to show that the party in default to pay the costs of the day which would include all costs thrown away by reason of the trial becoming abortive as well as the costs of the application to restore the case on the hearing list.

[79] And if this panel is satisfied that the party in default was prevented by sufficient cause from appearing when the suit was called for hearing on 13 January 2008 before the learned judge of the High Court and that the claim shows some merits and if justice can indeed be done by compensating the other side for any costs thrown away, this panel, with respect, is bound to set aside the judgment and order a new trial (*Buga Singh v. Koh Bon Keo* [1966] 1 LNS 22; *Haji Yahia bin Ismail v. Bukah binti Mayah Pakeh, Paylak binti Saydi* [1933] 7 FMSLR 86, SC; and *Redditch Benefit Building Society v. Roberts* [1940] 1 Ch 415, [1940] 1 All ER 342, CA).

[80] Here, we are concerned with an application to set aside a judgment after a trial in the absence of the appellants defendants and their counsel. And because of this, different considerations apply as compared to an application to set aside a default judgment. The predominant consideration for this panel to consider was not whether there was a defence on the merits but rather the reason as to why the appellants defendants had absented themselves, and if the absence was deliberate and not due to accident or mistake, this court would be unlikely to allow a re-hearing. There are other relevant considerations which include the prospects of success of the appellants defendants in a re-trial, the delay in applying to set aside the judgment, the conduct of the appellants defendants, whether the successful party would be prejudiced by the judgment being set aside and the public interest in there being an end to litigation.

[81] All these predominant considerations have been neatly set out in the judgment of Leggatt LJ, writing for the Court of Appeal, in *Shocked and Another v. Goldschmidt and Others* [1998] 1 All ER 372. At p. 381, this was what Leggatt LJ said:

> These authorities about setting aside judgment after a trial indicate that each case depends on its own facts and that the weight to be accorded to the relevant factors will alter accordingly. But from them I derive the following propositions or 'general indications' as Lord Wright might have called them. (1) Where a party with notice of proceedings has disregarded the opportunity of appearing

A at and participating in the trial, he will normally be bound by the decision. (2) Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing. B (3) Where the setting aside of judgment would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so. (4) The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success. (5) Delay in applying to set C aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it. (6) In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered: where he has failed to comply D with orders of the court, the court will be less ready to exercise its discretion in his favour. (7) A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences. (8) There is a public interest in there being an end to litigation and in not having the time of the court occupied by E two trials, particularly if neither is short.

[82] Raja Azlan Shah J (as His Majesty then was) in *Buga Singh v. Koh Bon Keo (supra)* dealt with a situation where on the date of the hearing both the appellant and his counsel were absent but F the respondent and his counsel were present and, in such circumstances, the learned magistrate dismissed the appellant's case with costs. On appeal, this was what His Majesty said:

To my mind, so long as the claim shows some merits and justice can be done by compensating the other side for any costs thrown G away, then a new trial ought to be ordered. In the present case counsel for the respondent sought to argue that the claim bears no merits as it contravenes the limitation law, that is, the I.O.U. chit was executed in 1952 but action was brought in 1964. That may be so, but paragraph 4 of the statement of claim avers that H in 1963 three sums of money were paid on various dates by the respondent in respect of the alleged loan. Therefore, if that averment is substantiated, the appellant's claim may be well founded as time runs afresh from date of payment, ie, from 1963. That is an issue to be tried and, in my judgment, contains some merits.

I

It is not my intention to exegesise the law on this subject but I will merely refer to the case of *Hayman v. Rowlands* [1957] 1 All ER 323 where Denning LJ had this to say:

> I have always understood that, if by some oversight or mistake a party does not appear at the court on the day fixed for the hearing, and judgment goes against him but justice can be done by compensating the other side for any costs and trouble to which he has been put, then a new trial ought to be granted. The party asking for a new trial ought to show some defence on the merits but, so long as he does so, the strength or weakness of it does not matter.
>
> In my view there are some merits in the claim, and justice can be done by compensating the respondent for any costs thrown away. I will allow this appeal and order a fresh trial. The appellant will have to bear all costs thrown away by the respondent.

[83] The law is settled. It is this. That although the court has an unfettered discretion to grant or refuse an application to set aside a judgment after a trial in the absence of the appellants defendants and their counsel, there must be some material on which this panel can exercise its discretion in favour of the appellants defendants. The material considerations which this panel ought to consider in granting or refusing an application to set aside a judgment after a trial in the absence of the appellants defendants and their counsel are as follows:

(i) whether the absence of the appellants defendants and their counsel was deliberate or due to a mistake?

(ii) whether there are prospects of success and merits of the appellants defendants' defence at the re-trial?

(iii) whether there was any delay in the application filed by the appellants defendants in setting aside the judgment after a trial?

(iv) whether there was any conduct on the part of the appellants defendants which would prejudice the respondents plaintiffs?

[84] I will now examine the material considerations in quick succession.

The First Consideration

[85] The learned judge of the High Court arrived at the conclusion favouring the respondents plaintiffs by relying on the following authorities:

(a) *Sri Jaya Transport Co. Ltd. v. Fernandez* [1969] 1 LNS 177, FC;

A (b) *Gan Hay Chong v. Siow Kian Yuh & Anor* [1975] 1 LNS 42 FC;

(c) *Yogananthy AS Thambaiya lwn. Idris Osman* [2006] 1 CLJ 430, CA;

B (d) *Delcont (M) Sdn. Bhd. v. Motor Sport International Ltd. (Servant Or Agents At Federal Territory Labuan) & Ors.* [1996] 1 CLJ 450, HC; and

(e) *Asia Commercial Finance (M) Bhd v. Pasadena Properties* C *Development Sdn Bhd & Ors* [1990] 2 CLJ 961; ([1990] 1 CLJ (Rep) 606) HC.

[86] Upon perusal of these authorities, I must categorically say that not all the authorities relied upon dealt with an application D to set aside a judgment pursuant to O. 35 r. 2 of the RHC. And the "mistake" of the solicitors in these authorities together with the circumstances that led to such mistake differed greatly from the present appeal at hand. A short synopsis of these authorities will now be rendered.

E **[87]** The case of *Sri Jaya Transport Co. Ltd. v. Fernandez (supra)* concerned an application for special leave to appeal out of time under r. 13 of the Federal Court (Civil Appeals) (Transitional) Rules 1963 – LN 242/63. The Federal Court held that the F appellants should have applied for leave under s. 68(2) of the Courts of Judicature Act 1964 and since they have failed to do so and have not shown that there are special grounds for the court to exercise its discretion to grant them special leave to appeal out of time, the application must be dismissed.

G **[88]** The case of *Gan Hay Chong v. Siow Kian Yuh & Anor (supra)* concerned the application of the appellant for extension of time to file the memorandum of appeal and to serve it on the respondents. In dismissing the appeal, the Federal Court held that the mistake of the appellant's solicitors in the circumstances of the H case did not constitute a sufficient ground for granting the extension of time. It must be emphasised that the mistake referred to by the Federal Court was entirely different from the mistake by the appellants defendants' solicitors in the present appeal before this court. Delivering the judgment of the Federal Court, this was I what Chang Min Tat J, had to say:

> Since the learned trial judge had, with regret, proceeded on a wrong principle, it behoves us, sitting on appeal, to examine whether the facts merit the exercise of judicial discretion in favour of the appellant On the facts as disclosed, it does not appear possible to challenge Mr. Atma Singh's contention that he had read the 14 day period in rule 2(5) of Order XXXIX Subordinate Court Rules to run from the date of service of the appeal record on him and not from the service of the notice that the appeal record was ready but he was advised well within time by a letter dated May 28, 1973 from the solicitors for the respondents of the requirement in Order 59 rules 2(1) and (2) of the Rules of the Supreme Court and he could not really contend that he remained in ignorance of this rule. He would or should have been disabused of his earlier mistake by this later advice.

[89] It is apparent that both *Sri Jaya Transport* and *Gan Hay Chong* cases are poles apart from the present appeal. These two cases do not relate to an application to set aside a judgment after a trial in the absence of the absent parties and their counsel. Thus, different considerations would apply and the learned judge of the High Court had misdirected himself when he relied on these two cases.

[90] I shall now say something about the case of *Yogananthy AS Thambaiya v. Idris Osman (supra)*. That was a case where the Court of Appeal considered, *inter alia*, the appellants' appeal against the decision of the High Court judge in dismissing the appellants' application to set aside the judgment. The Court of Appeal was satisfied, after perusal of the written judgment of the High Court, that the trial judge's decision was correct in view of the conduct of the counsel for the appellants which was said to be contumelious and undeserving of the court's sympathy. By comparison, in the present appeal, the appellants defendants have filed the appeal expeditiously and without any delay or contumelious conduct.

[91] The plaintiff applied *ex parte* in *Delcont (M) Sdn. Bhd. (supra)* and obtained various injunctive orders against the defendants. The defendants applied for leave to enter conditional appearance and then filed a fresh application to set aside the issue and service of the writ. The registrar allowed the prayer and the plaintiff appealed. The appeal came up before the first High Court judge on 21 June 1995 and on that date only the plaintiff's counsel was present. The first High Court judge nonetheless heard the plaintiff and deferred judgment to 10 July 1995 and on that

A date the first High Court judge made an order allowing the appeal with costs in the presence of both parties. The defendants then applied to set aside the order of the first High Court judge and argued, *inter alia*, that they could do so by virtue of O. 35 r. 6 of the RHC. At pp. 460 to 461, Kamalanathan Ratnam JC had this
B to say:

> On the question of merits the applicants' Counsel's reason for not attending the hearing of the appeal on 21 June 1995 was because she had failed to enter the date in her diary.
>
> C In response to this Mr. Chin referred me to *Chin Hua Sawmill Co. Sdn. Bhd. v. Tuan Yusoff bin Tuan Mohamed* [1973] 1 LNS 15 and to *Tong Lee Hwa & Anor v. Malayan Banking Bhd.* [1978] 1 LNS 219. In both cases the mistake of a solicitor was held to be insufficient reasons for granting special leave. The applicant's
> D reply to these two cases is that the cases related to special leave.
>
> In my view, failure to enter the diary is not sufficient enough grounds to satisfy me that there are merits.
>
> In the circumstances, I dismiss the application with costs.

E **[92]** Factually speaking, in the present appeal, the appellants defendants not only relied on the fact that there was a mistake in the failure to enter the hearing date in the firm's master diary as a ground for setting aside the judgment but have also advanced other grounds, of which I have more to say in a short moment.
F

[93] I will now briefly narrate the facts in *Asia Commercial Finance (M) Bhd v. Pasadena Properties Development Sdn Bhd & Ors (supra)*. In that case, the solicitors on record for the defendants had informed the senior assistant registrar that he was discharging
G himself from representing the defendants. It was for this reason that no counsel for the first and third defendants was present on the date of the hearing which was scheduled on 20 November 1989. And the second defendant also informed the court that he had just appointed a new counsel. Unfortunately, the solicitors on
H record had not made any formal application to discharge himself. It was for this reason that the court considered that the same firm of solicitors was still the solicitors on record for the defendants on 20 November 1989. The first and the third defendants applied to have their appeals reinstated and the first
I and the second defendants also applied to enlarge time to apply for further arguments. In dismissing the defendants' applications, Zakaria Yatim J (as he then was) aptly said at p. 968 (p 614) of the report:

In the present case, when I dismissed the appeal by the first and third defendant on 20 November 1989, there was a solicitor on record but he was absent. He had not filed any affidavit to explain or to give reasons why he was absent. As stated earlier the second defendant's averment for and on behalf of the first defendant in his affidavit is inadmissible. The explanation in the affidavit on the absence of the third defendant is not sufficient ground to grant the extension of time.

In the absence of an affidavit giving sufficient grounds to justify an extension of time to enable the first and third defendants to apply for further argument, the second application was dismissed with costs.

Application dismissed.

[94] I will now refer to the affidavit affirmed by Tunku Alina bte Raja Mohd Alias ("Tunku Alina") on 14 January 2008 as seen at pp. 295 to 299 at vol. 2 of the record of appeal. In her affidavit, Tunku Alina sets out the reasons for the absence of the solicitors for the appellants defendants before the High Court on 13 January 2008. This was what she deposed to (in its original Malay language text):

2. Fail ini telah dikendalikan oleh seorang dari peguam saya bernama Encik Munir Shah bin Mohamed Husan, yang telah meletak jawatan semenjak 19/12/2007.

3. Oleh yang demikian, saya tidak mengetahui bahawa tarikh bicara bagi kes ini yakni pada 13/01/2008 dan 14/01/2008 telah **tidak** dimasukkan olehnya ke dalam diari firma kami (kemungkinan besar beliau telah terlepas pandang) dan dengan sebab itu, tiada peguam yang mewakili anak guam kami yakni Defendan-Defendan, pada tarikh bicara pada 13/01/2008 tersebut. Sekarang ditunjukkan dan dikemukakan kepada saya salinan dari diari firma kami bagi 13/01/2008 bertanda Ekshibit 'TAA-1'.

4. Saya hanya diberitahu oleh anak guam saya, yang telah menalipon saya pada malam 13/01/2008 apabila berita nasional di televisyen melaporkan bahawa Mahkamah yang Mulia ini telah memasukkan penghakiman terhadap anak guam saya. Saya terus hadir di Mahkamah pada 14/01/2008 untuk membuat pertanyaan.

5. Sesungguhnya, perkara ini adalah suatu kesilapan yang amat dikesali oleh kami, dan kami memohon maaf terhadap Mahkamah yang Mulia ini kerana tidak hadir di Mahkamah pada 13/01/2008. Saya menyatakan bahawa ketidakhadiran

A anak guam saya dan saya di Mahkamah yang Mulia ini pada tarikh perbicaraan adalah tidak disengajakan dan tidak dimaksudkan untuk menghina Mahkamah yang Mulia ini.

6. Kami telah membela kes ini dengan sepenuh hati dan luhur, dan tidak mungkin akan dengan sengaja engkar hadir di B Mahkamah, melainkan disebab kesilapan yang berlaku ini. Perkara ini sesungguhnya tidak disangka oleh saya dan amat dikesali.

[95] And finally, Tunku Alina averred as follows (in its original C Malay language text):

11. Oleh sebab-sebab yang dinyatakan di atas, saya memohon maaf sekali lagi terhadap ketidakhadiran peguam semasa tarikh perbicaraan, dan dengan rendah hati memohon supaya penghakiman yang dimasukkan terhadap Defendan-Defendan D semasa ketidakhadiran Defendan-Defendan ataupun kami sebagai peguam, diketepikan dan suatu tarikh perbicaraan baru ditetapkan.

12. Saya menyatakan bahawa penghakiman ini amat memprasangkakan dan tidak adil kepada pihak Defendan-E Defendan yang tidak berpeluang untuk membela tuntutan Plaintif-Plaintif manakala jika penghakiman ini diketepikan, Plaintif-Plaintif masih berpeluang untuk meneruskan tuntutan mereka terhadap Defendan-Defendan dalam perbicaraan penuh kes ini. Defendan-Defendan tidak akan dapat F dipampaskan atas prasangka yang dialami oleh Defendan-Defendan sekiranya Defendan-Defendan tidak dibenarkan mengutarakan kesnya.

[96] Briefly, the reasons advanced by Tunku Alina may be stated as follows:

G

(a) that Munir – the solicitor who had charge of the matter, had resigned on 19 December 2007;

(b) that she did not know that the trial date for this matter H scheduled on 13 January 2008 to 14 January 2008 was not entered into the firm's master diary by Munir and every possibility it was an oversight on the part of Munir;

(c) consequently, no counsel for the appellants defendants was present in court on the trial date on 13 January 2008;

I

(d) that her client had telephoned her when news about the judgment entered against the appellants defendants was broadcasted live over national television on the night of 13 January 2008 and she quickly proceeded to the Kota Bharu High Court on 14 January 2008;

(e) that it was a regrettable mistake on the part of the solicitors for the appellants defendants and they apologise for their non-attendance on 13 January 2008 and she said that the absence of her clients in court on the date of the trial was unintentional and was not meant to show disrespect to the Honourable Court;

(f) that the solicitors for the appellants defendants have diligently defended the case and it was improbable that they purposely refuse to attend court and that what had happened was unexpected and regrettable;

(g) for the aforesaid reasons, she apologised profusely for the absence of the solicitors on the date of the hearing and pray that the judgment entered after trial in the absence of the appellants defendants and their solicitors be set aside and a new trial be ordered;

(h) that the judgment entered after a trial in the absence of the appellants defendants was prejudicial and unfair in that the appellants defendants were deprived of defending the suit and in the event that the judgment is set aside, the respondents plaintiffs could still be afforded the opportunity to proceed with their claim by way of a full trial against the appellants defendants; and

(i) that the appellants defendants cannot be compensated for the prejudice which they suffer in the event they are not allowed to defend the suit.

[97] I need to refer, once again, to the case of *Burgoine v. Taylor (supra)*. That was a case where the defendant was not represented at the trial of the action because his solicitors was ignorant that the action had, in fact, been transferred from one judge to another and therefore the solicitors had missed out the correct date of the trial before the new judge. That being the case, judgment was entered in favour of the plaintiff. The defendant's solicitors then proceeded to apply to set aside the judgment and the application was refused by the High Court judge who held

A that the solicitor had been guilty of gross negligence. On appeal, the judgment was set aside. Jessel MR had this to say in a rather short judgment (see pp. 4 to 5 of the report):

> We think that the order asked for by the Defendant ought to be
B made. Solicitors cannot, any more than other men, conduct their business without sometimes making slips; and where a solicitor watches the list, and happens to miss the case, in consequence of which it is taken in his absence, it is in accordance with justice and with the course of practice to restore the action to the paper, on the terms of the party in default paying the costs of the day,
C which include all costs thrown away by reason of the trial becoming abortive. As a general rule, solicitors in my branch of the Court consent to such an order as is now asked, and that such an application should be opposed is to me a novelty. Still, as the Appellant was in default, he must pay the costs of the
D application to the Court below, but no costs of the appeal.

[98] There is an adage which says that justice hurried is justice buried. Before the learned judge of the High Court only three witnesses were called, namely:

E (a) SP1 Awang Soh bin Mohamad (see pp. 144 to 195 of the appeal record at vol. 2);

(b) SP2 Othman bin Hamat (see pp. 195 to 210 of the appeal record at vol. 2); and

F (c) SP3 Tuan Fakhrur Razi bin Tuan Yusof (see pp. 210 to 215 of the appeal record at vol. 2).

[99] These three witnesses gave evidence on 13 January 2008 and thereafter the learned judge of the High Court gave judgment
G in favour of the respondents plaintiffs and awarded those damages as alluded to earlier. It was a trial in the absence of the appellants defendants and their counsel. And in the words of Ralph Gibson LJ in *Packer v. Denny* [1986] CA Transcript 310 as quoted by Leggatt LJ in *Shocked and Another v. Goldschmidt and Others (supra)*
H at p. 381 that:

> If a reasonable explanation is provided for the absence of the party at the hearing, and if the application is made in due time, justice normally requires that the judgment be set aside for the obvious reason that a trial is unjust if only one side is heard and
I the other side wishes to be heard ... .

[100] In *Hock Seng Construction Sdn Bhd & Anor v. Yeoh Poh Owi & Anor* [2001] 4 CLJ 1, Justice Abdul Hamid Mohamad, JCA (later the Chief Justice of Malaysia) in a dissenting judgment involving an appeal record that was not complete and the Court of Appeal by a majority dismissed the notice of motion for an extension of time to file a supplementary record of appeal to include certain evidence of the first respondent which had been inadvertently omitted in the original record of appeal and eventually the Court of Appeal, also by a majority, dismissed the appeal on the ground that there was no proper appeal before the court, had this to say at p. 7 of the report:

> The reason is not difficult to understand: the main function of the court is to do justice not just to dispose of cases. At times it is unjust to dismiss an appeal without even hearing the arguments on merits purely on the ground, that due to the mistake of a solicitor, something that should have been done is not done.

[101] I agree with the submissions that the appellants defendants solicitors' oversight of the actual date of the trial before the learned judge of the High Court was a genuine mistake and not deliberate based on the following facts:

(a) that it is an undisputed fact that Munir who had charge of the matter had resigned on 19 December 2007;

(b) that it is also an undisputed fact that Munir as the solicitor did not enter the date of the hearing into the firm's master diary;

(c) that the appellants defendants have defended the case diligently at all material times; and

(d) that the absence of the appellants defendants or its representatives (bearing in mind that the second appellant defendant by the name of Ibrahim bin Ismail had passed away on 28 August 2006) would further support the appellants defendants' solicitors' contention that they were not aware of the hearing date.

[102] In my judgment, the learned judge of the High Court erred in law when he failed to accept the reasons for the absence of the appellants defendants and their solicitors on the date of the hearing. In my judgment, the mistake was genuine and truly unintentional. The absence too was not deliberate.

A **The Second Consideration**

[103] The plaintiffs respondents' claim against the appellants defendants can easily be summarised in this manner:

B (i) All the 354 respondents plaintiffs contended that approximately on 20 September 2001 they discovered that there was fraud and/or conspiracy to commit fraud on the part of the second appellant defendant (now deceased) or on the part of the first appellant defendant (Lembaga Kemajuan Tanah Persekutuan (Felda)) based on a document which the respondents plaintiffs found which stated that the produce, namely, palm oil bunches was to be sold to the second appellant defendant (now deceased) at 18% KPG. The respondents plaintiffs contended that they never agreed to such a standard of 18% KPG.

D (ii) All the 354 respondents plaintiffs also contended that in conspiring to defraud them, the appellants defendants have altered the weighing system as well as the KPG level of the palm oil which caused the respondents plaintiffs to suffer a loss of between RM30 to RM50 per tonne of the palm oil sold to the second appellant defendant (now deceased).

[104] I will now summarise the appellants defendants' defence in this way:

F (a) The appellants defendants vehemently denied the allegations and contended that the respondents plaintiffs' palm oil produce was sold in blocks and carried by transport agents appointed by the respondents plaintiffs. And the process of weighing the palm oil was conducted in accordance with the appropriate standard by skilled and certified graders that have been certified by the "Lembaga Minyak Sawit Malaysia".

H (b) The appellants defendants also contended that accurate and complete records of the sale of palm oil bunches have been recorded and such recordings can be found in the accounts which were handed over to the transporters of the palm oil bunches. These transporters were a co-operative network set up by the respondents plaintiffs themselves.

I (c) That the representatives from the respondents plaintiffs have inspected the records for the sale of the palm oil bunches at the first appellant defendant's branch office and they did not register any objections.

(d) That the assessment at 18% KPG was arrived at in order to assess the quality of the palm oil bunches to ensure that it complied with the PORLA Manual Grading Requirements. A

(e) That the appellants defendants have on numerous occasions informed the respondents plaintiffs of the poor quality of the palm oil bunches that were produced. B

(f) That the weighing equipment at the second appellant defendant's factory has been inspected by officers from the Jabatan Timbang Dan Sukat Malaysia and no problems were detected. It was for this reason that the appellants defendants contended that the allegations of fraud and conspiracy were unfounded and without merit. C

(g) The appellants defendants contended that their records are available for inspection by the respondents plaintiffs and if at all the respondents plaintiffs suffered any loss it was mainly due to the poor quality of the palm oil bunches. D

[105] It must be borne in mind that the main allegations of fraud, cheating and conspiracy against the first appellant defendant hinged entirely on the actions of the second appellant defendant (now deceased) as the representative or as an agent or as an employee of the first appellant defendant. These averments were pleaded by the respondents plaintiffs in their amended statement of claim dated 18 June 2007 as seen at paras 8, 14 and 16 thereof. E F

[106] Flowing from all these, with the demise of the second appellant defendant it would be doubtful whether the burden of proof of conspiracy, fraud and cheating have been adequately proved by the respondents plaintiffs bearing in mind that the burden of proof remains throughout on the shoulders of the respondents plaintiffs notwithstanding the absence of the appellants defendants and their counsel from court on 13 January 2008. G H

[107] With the demise of the second appellant defendant, the whole case against the first and the third appellants defendants cannot be sustained. The second appellant defendant as the principal conspirator has died. If a question is asked as to who had manipulated the weighing machine the answer would point to I

A the second appellant defendant. And when the matter came up for hearing on 13 January 2008, there was no substitution of the second appellant defendant.

[108] The respondents plaintiffs made allegations of conspiracies
B against certain people who are not cited as parties in this suit. In his examination-in-chief, this was what SP2 Othman bin Hamat said in answer to questions 22 and 23 as seen at pp. 208 to 209 of the appeal record at vol. 2:

C S22: Pada pengetahuan kamu, apakah motif konspirasi dan pakatan jahat antara Pengurus Felda Kemahang 3, Naib Pengerusi dan Pengurus Defenden Ketiga?

J: Motif mereka, dengan membeli sawit pada harga yang cukup murah, dan menjual dengan harga pasaran, akan membolehkan
D kilang mendapat untung yang tinggi. Dengan keuntungan yang tinggi, Pengurus akan mendapat komisyen yang besar, dan komisyen ini diagih-agih di kalangan mereka, iaitu kepada Pengurus Kilang sendiri, Pengurus Felda Kemahang 3 dan Naib Pengerusi.

E S23: Setelah misteri penggunaan COP pada P2 terdedah, pernahkah kamu berjumpa dengan Pengurus Felda Kemahang 3?

J: Saya pernah bersemuka secara peribadi dengan Pengurus Felda Kemahang 3, mempersoalkan dia kenapa dia biarkan
F buah sawit peneroka dijual dengan harga yang tidak munasabah, sedangkan sewaktu Hamsidin ladang ini ladang terbaik, perahan mencapai KPG 20.50%, beliau jawab saya mahu cari makan. Beliau bagi tahu saya kalau saya duduk diam-diam, saya pun boleh sertai mereka.

G **[109]** The evidence was so unsafe, yet the learned judge of the High Court found that there was fraud and conspiracy. It must also be borne in mind that the learned judge of the High Court did not address the issue of whether the absence from court on 13 January 2008 was deliberate or otherwise.

H

[110] In the affidavit of reply of Wan Rohimi bin Wan Daud that was affirmed on 18 January 2008 as seen at pp. 304 to 319 of the appeal record at vol. 2, there was a categorical averment that the respondents plaintiffs have abandoned their claim against the
I second appellant defendant. At pp. 314 to 315 of the appeal record at vol. 2, Wan Rohimi bin Wan Daud deposed to the following set of facts:

(i) Penghakiman bertarikh 13/1/2008 dalam tindakan ini hanya dimasukkan terhadap Defendan Pertama dan Ketiga sahaja dan tidak melibatkan Defendan Kedua yang telah meninggal dunia;

(ii) Oleh itu, Plaintif-Plaintif sebenarnya telah mengabaikan (abandon) tuntutan ini terhadap Defendan Kedua dan pendirian untuk mengabaikan (abandon) tuntutan terhadap mana-mana Defendan adalah dibenarkan oleh undang-undang;

(iii) Tambahan pula, kausa tindakan ke atas Defendan Kedua adalah berasas tort untuk frod, konspirasi dan pecah amanah yang tidak boleh dipindahkan kepada mana-mana pewaris. Ia bukan satu tuntutan berkenaan hutang atau pemecahan mana-mana kontrak yang mengikut wasi-wasi.

[111] It must be borne in mind that Wan Rohimi bin Wan Daud affirmed that affidavit in reply as counsel for the respondents plaintiffs.

[112] It is not the duty of the appellants defendants to substitute or add any other person after the death of the second appellant defendant. The respondents plaintiffs have decided and picked who to sue. Both the first and the third appellants defendants must act through an individual in the person of the second appellant defendant. As a joint tortfeasor, when the second appellant defendant died, that would be the end of the matter.

[113] A company can only act through its agent. With the demise of the second appellant defendant, the issue of conspiracy would die a natural death. Without the second appellant defendant, where is the conspiracy? As the principal tortfeasor, the second appellant defendant has died and according to Wan Rohimi bin Wan Daud in his affidavit in reply, the respondents plaintiffs have abandoned the claim against the second appellant defendant. That being the case, how could the learned judge of the High Court decided the case against the appellants defendants?

The Third Consideration

[114] Here, there was no delay by the appellants defendants' in applying to set aside the judgment after a trial in the absence of the appellants defendants and their counsel. Delay was not an issue at all. The appellants defendants had acted promptly and timeously in filing the said application.

A **The Fourth Consideration**

[115] According to the learned judge of the High Court, the respondents plaintiffs would be prejudiced if the application to set aside the judgment after trial in the absence of the appellants B defendants and their counsel was allowed because the respondents plaintiffs have suffered a long time due to the appellants defendants' actions. With respect, it was not within the purview of the learned judge of the High Court to make a finding as to the nature of the purported suffering of the respondents plaintiffs.

C **[116]** It must be borne in mind that the respondents plaintiffs' claim was for damages. And the claim for damages must be proved by each and every one of the 354 respondents plaintiffs before the High Court. *Per se* "class action" suit does not exist in Malaysia. D Each and every one of the respondents plaintiffs has a distinct and separate contract with the first appellant defendant. And this suit too was not filed in the form of a representative action. That being the case, each respondent plaintiff, in the High Court, must give evidence of the loss suffered. The reference to a period of E long suffering by the learned judge of the High Court was not predicated on any cogent evidence placed before the High Court be it by way of documents or by way of oral evidence during the course of the trial in the absence of the appellants defendants and their counsel.

F **[117]** In sharp contrast, the appellants defendants were prejudiced when they were deprived of the opportunity to defend the action. On the other hand, if the second appeal is allowed and the case be remitted back to the High Court for a re-trial, the respondents plaintiffs would still have the opportunity to continue G with their claim.

[118] It is comforting to know that the first appellant defendant has deposited RM7 million into court. According to the learned counsel for the appellants defendants that sum of money would H remain there until this court orders a re-trial. The learned counsel for the appellants defendants even ventured to suggest that that sum may be put in the joint name of both solicitors, presumably as a gesture of goodwill. Finally, the learned counsel for the appellants defendants submitted that the judgment of the learned I judge of the High Court ought to be set aside and a re-trial

ordered and that the costs here and below be borne by the appellants defendants. Indeed all these facts should dispel any fear that the respondents plaintiffs would be prejudiced.

Analysis

[119] It seems to me that the appellants defendants are merely seeking to enforce their right to be heard and present their case and defend the action. They want to have their day in court. To deprive the appellants defendants of defending the action would be unjust and would likely lead to a real miscarriage of justice. According to the Court of Appeal of Singapore in the case of *Su Sh-Hsyu v. Wee Yue Chew* [2007] 3 SLR 673 that apart from the "broad-ranging factors" as set out by Legatt LJ in *Shocked and Another v. Goldschmidt and Others (supra)*, another overriding consideration was added (see p 688) and that was:

> whether there is a likelihood that a real miscarriage of justice has occurred.

[120] There are exceptional reasons and other countervailing factors in favour of setting aside the judgment entered after trial in the absence of the appellants defendants and their counsel. All these must be considered in order to avoid a "real miscarriage of justice". In my judgment, there was an improper judicial appreciation of the evidence by the learned judge of the High Court. On this point, reference should be made to the case of *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309, FC, a decision of Steve Shim CJ (Sabah & Sarawak). There his Lordship sets out the law in this way (see p. 320 of the report):

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision

A arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

[121] May I add that the trial court must also test the evidence of a particular witness against the probabilities of the case. And this can only be achieved if both parties attend the hearing and present their versions accordingly.

[122] The appellate court is certainly free to reverse the conclusions of the trial court if the grounds given by the trial court are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears from the evidence that the trial court in reaching its decision has unmistakably not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight of the evidence and impact of the circumstances admitted or proved (*Watt Or Thomas v. Thomas* [1947] AC 484, House of Lords).

[123] But a distinction has to be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In regard to the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and expeditiously form an independent opinion than in the case of the former (*Benmax v. Austin Motor Co., Ltd.* [1955] 1 All ER 326; and *Tay Kheng Hong v. Heap Moh Steamship Co. Ltd.* [1964] 1 LNS 202).

[124] Using these authorities as useful guidelines, I arrive at the conclusion that the learned judge of the High Court was plainly wrong when he failed to judicially appreciate the following flaws:

(a) admitted documents that were not previously disclosed;

(b) accepted hearsay evidence; and

(c) failed to consider that each of the respondents plaintiffs must prove the loss suffered.

[125] I shall now consider these flaws one after another.

Admitted Documents That Were Not Previously Disclosed

[126] On 13 January 2008, at the trial of the action in the absence of the appellants defendants and their counsel, the respondents plaintiffs produced:

(a) the bundle of documents in Bundle "I" that had not been served on the appellants defendants' solicitors nor agreed to by the appellants defendants' solicitors prior to the trial (see the appeal record at vols. 9 to 10 at pp. 1040 to 1354);

(b) and the learned judge of the High Court admitted documents from the Common Bundle of Documents at Bundle "G" and Bundle "H" where the authenticity and contents of the documents were disputed (see the appeal record at vol. 2 at pp. 144, 193 and 202); and

(c) the respondents plaintiffs also produced ten (10) other exhibits without calling the makers of the said documents to attest to the veracity of the said documents (see the appeal record at vols. 7 to 10).

[127] Sections 61 to 73A of the Evidence Act 1950 (Act 56) deal with documentary evidence and these sections would surely curtail the admission of those documents which the respondents plaintiffs sought to admit. *Sarkar's Law of Evidence*, vol. 1 at p. 1180 carries the following germane passage which merits reproduction:

> Secondary evidence should not be accepted without a sufficient reason being given for non-production of the original (*Syed Abbas v. Yadeen*, 3 MIA 156). A document should not be considered as proved because its genuineness is not disputed by the opposite party (*Kirteebash v. Ramdhone*, BLR Sup Vol 658). The documents upon which reliance is sought to be placed must be brought on records of the case legally. Documents do not prove themselves. (*Mostt Rajwati Devi v. The Joint Director, Consolidation, Govt of Bihar, Patna,* A [1989] Pat 66, 67). Every document should first be started by some proof or other before the person who disputes that document can in any way be considered bound by it (*Reazoonnissa v. Bookoo,* 12 WR 267). A person can be allowed to depose to the receipt of letters from another or that he took certain action on them, but his evidence is no proof of the contents of the letters (*Firm Chunni v. Firm Sheo,* A [1943] A 370). A letter filed by a party may be looked into without any further proof at the instance of the opposite party (*Rudnap Export Import v. Eastern Associates Co,* A [1984] Del 20, 29). Oral admissions as to contents of a written contract are not relevant if the document is inadmissible for want of registration (*Shk Ibrahim v. Parvata,* 8 Bom HCR 163). Whatever the law may have been before the passing of the Act, the rules contained in this

A enactment should now be strictly observed. 'S. 61 lays down that the contents of documents may be proved either by the primary or by secondary evidence. (*Ram Pd v. Raghunandan,* 7 A 738, 743).

B **[128]** At the local scene, we have the case of *Chong Khee Sang v. Pang Ah Chee* [1983] 1 LNS 57 to consider. There Shankar J (as he then was) aptly said, and it is still good law:

In the first place it is the duty of counsel engaged in a case to see that the documentary evidence upon which he relies is C properly tendered in court and proved. After they have been proved he should also see that when admitted into evidence the documents are properly marked as required by law. Reference may be made in this connection to *Immam-Ud-Din v. Sri Ram Perbhu Dial* AIR [1928] Lah. 142.

D A document does not become admissible in evidence merely because it has been handed to the adjudicating officer and marked as exhibit: See in this connection *Secretary of State v. Sarla Devi,* AIR [1924] Lah. 548, *Feroze Din v. Nawab Khan* AIR [1928] Lah. 432, 434 and *Baldeo Sahai v. Ram Chander & Ors.* AIR [1931] E Lah. 546, 550. Whilst these Indian authorities are only of persuasive value, the propositions which they set out are really elementary. When the hearing began in this case the old Subordinate Court Rules 1950 were in force. By the second hearing the Subordinate Court (Amendment) Rules 1980 had already come into force (*vide* PU(s) 106/81 on April 1 1981) but F the relevant Order 19 r. 8 and the new Order 28 Rule 14 (which has its equivalent in the Rules of the High Court Order 35 Rule 8) were all to the same effect. Documents put in evidence were to be marked as exhibits and retained by the court. But what has not been specifically stated and should be understood by all G concerned is that a document cannot be admitted into evidence and marked as such until it has been properly proved.

[129] And continuing of the same case, Shankar J (as he then was) had this to say:

H The issue here appears to relate to the question as to whether agreeing a document merely dispenses with proof of its existence or execution, or whether it goes further and dispenses with proof of the contents of the documents. The strictures passed by the judge in the last of the aforementioned judgments on Sharma, J make somewhat sad reading. Certainly the law must be that once I a document is included in an Agreed Bundle, it is no longer necessary to prove their existence or execution. Nor is it necessary to produce the original. But so far as the contents of the documents are concerned the truth of the same has still to be

proved, in the absence of any specific admission of the facts therein contained. That this is so may readily be appreciated when one considers 2 police reports in an Agreed Bundle each giving a diametrically opposite version of how an accident took place. The version of the accident is generally not agreed and in issue. To that extent the makers of the document may be subject to cross-examination to establish where the truth of the matter lies. So whilst it is not necessary to prove the documents, it would still be necessary to prove the truth of the contents of the documents.

[130] It is now apparent that the learned judge of the High Court has violated the rules relating to the admission of evidence when he made a finding in favour of the respondents plaintiffs. In the absence of the solicitors for the appellants defendants on the date of the trial, a higher duty was placed on both the respondents plaintiffs and the learned judge of the High Court to abide strictly to the procedural rules relating to the admissibility of the documents that were produced and marked as exhibits so that the sanctity of the written judgment of the learned judge would be preserved and free from attack. But sad to say, this was not done.

[131] The learned judge of the High Court freely admitted documents without calling the makers of the said documents. And documents not previously agreed to by the parties were unilaterally admitted without calling for the makers of the said documents to testify. All these are elementary and should be adhered to. For these reasons, I say that the judgment of the learned judge of the High Court is unsafe to rely upon and the second appeal should be allowed.

Hearsay Evidence

[132] The notes of evidence would show that hearsay evidence was admitted contrary to the provisions of the Evidence Act 1950 (Act 56). I will now reproduce the hearsay evidence in question.

[133] For starters, I will begin by referring to the evidence of SP1 Awang Soh bin Mohamad:

(a) See the record of appeal at vol. 2 at p. 146:

S.6: Adakah pada pengetahuan kamu, peneroka-peneroka lain diberikan salinan perjanjian tersebut?

J: Saya amat pasti peneroka-peneroka lain juga tidak dibekalkan dengan salinan perjanjian tersebut.

(b) See the record of appeal at vol. 2 at p. 149:

S.15: Pada pengetahuan kamu, ada tak peneroka guna baja sendiri atau membeli baja di luar pengetahuan Felda?

J: Tak ada, kerana peneroka tidak mampu. Lagipun baja Felda sudah mencukupi dan mutunya telah disahkan oleh Felda sendiri.

(c) See the record of appeal at vol. 2 at p. 150:

S.21: Sepanjang pengetahuan kamu, adakah pernah terdapat mana-mana peneroka di Felda Kemahang 3 yang pernah dikenakan hukuman atas kesalahan menyalahgunakan baja?

J: Sepanjang pengetahuan saya, tidak pernah ada.

(d) See the record of appeal at vol. 2 at p. 161:

S.58: Berdasarkan Fasal 9 perjanjian ini, apakah peranan kilang sawit Felda pada waktu itu?

J: Pada pengamatan saya, kilang sawit Felda pada waktu itu tidak membeli buah sawit peneroka, tetapi sebagai agen yang menjual hasil sawit kami dan mengambil melalui upah-upah yang dipotong seperti yang diperuntukkan melalui Fasal 9 perjanjian tersebut sahaja.

(e) See the record of appeal at vol. 2 at p. 163:

S.64: Pada pandangan kamu, kenapa Defendan Ketiga berbuat demikian?

J: Saya percaya sebagai sebuah entiti korporat yang hanya mementingkan keuntungan, Defendan Ketiga hanya mementingkan keuntungan dan prestasi keuntungan tahunan kilangnya sahaja. Lagi murah mereka beli buah sawit kami, mereka akan dapat lebih untung. Apabila kilang mendapat untung yang lebih, maka pekerja kilang termasuk grader di kilang, dan lebih-lebih lagi pengurus kilang akan dibayar bonus atau komisyen yang lebih tinggi.

(f) See the record of appeal at vol. 2 at p. 187:

S.127: Apakah yang kamu tahu tentang kilang?

J: Kilang tidak dapat perahan maksimum sekiranya kerja-kerja mengukus tidak dijalankan dengan sempurna iaitu tidak mengikut masa yang ditetapkan. Buah tidak akan relai dari tandan, minyak tidak akan keluar semaksimum yang boleh. Jika berlaku kebocoran paip saluran minyak, minyak

akan mengalir ke takungan buangan, alat pemerah sudah lama tidak diservis atau diganti. Perkara ini boleh menjatuhkan perahan minyak.

[134] Next, I will refer to the evidence of SP2 Othman bin Hamat:

(a) See the record of appeal at vol. 2 at pp. 204 to 205:

S.21: Boleh kamu terangkan dengan lebih lanjut tentang konspirasi dan pakatan antara Pengurus Felda Kemahang 3, Naib Pengerusi dan Pengurus Defenden Ketiga?

J: Naib Pengerusi adalah wakil peneroka yang sepatutnya menjaga kepentingan peneroka. Pengurus Felda Kemahang 3 juga sepatutnya menjaga kepentingan peneroka. Apa yang berlaku, Naib Pengerusi dan Pengurus Felda Kemahang 3, telah berpakat dengan Pengurus Kilang untuk membeli buah sawit kami dengan harga yang tak munasabah. Oleh kerana Pengurus Felda Kemahang 3 dan Naib Pengerusi sudah sepakat dengan Pengurus Kilang, maka Pengurus Felda Kemahang 3 dan Naib Pengerusi tidak akan membuat aduan sekali pun terdapat banyak aduan dari peneroka. Bahkan mereka bertindak dengan lebih teruk lagi dengan mengarahkan COP pada P2 dibuat ke atas resit jual beli buah sawit kami.

(b) See the record of appeal at vol. 2 at pp. 206 to 208:

S.24: Boleh kamu terangkan dengan lebih jelas tentang pakatan dan konspirasi Defendan-Defendan?

J: Saya percaya mekanisma pakatan dan konspirasi mereka adalah seperti berikut:

(i) Atas hasutan dan dorongan Defendan Kedua, selaku kakitangan dan ejen Defendan Pertama, Defendan Kedua dengan palsunya membuat akuan dalam 'Akuan Penerimaan BTS' bahawa 'Penjual mengakui hantaran mutu BTS di bawah KPG 18%'. Penjualan BTS ini adalah di atas dasar kehendak penjual dan penjual bersetuju KPG yang dibayar;

(ii) Atas dorongan dan konspirasi Defendan Kedua selaku kakitangan dan ejen Defendan Pertama, Defendan Ketiga dengan berniat jahat menurunkan kadar KPG bertentangan dengan kadar yang sepatutnya untuk menurunkan harga setiap tan buah/hasil sawit yang perlu dibayar kepada Plaintif-Plaintif;

A (iii) Defendan Kedua selaku kakitangan dan ejen kepada Defendan Pertama, telah berkonspirasi dengan Defendan Ketiga untuk menyalahgunakan kaedah timbangan untuk memastikan gred KPG diturunkan;

B (iv) Defendan Ketiga membeli dan/atau Defendan Kedua mengarahkan peneroka menjual buah/hasil sawit Plaintif di bawah KPG yang sepatutnya tanpa pengetahuan Plaintif-Plaintif;

C (v) Defendan Kedua selaku kakitangan dan ejen Defendan Pertama membuat representasi yang salah tentang hak Plaintif-Plaintif berkenaan dengan hasil jualan sawit tersebut;

D (vi) Defendan Kedua telah mengkhianati kepercayaan yang diberikan oleh Plaintif-Plaintif dan gagal melindungi kepentingan dan kebajikan Plaintif-Plaintif;

E (vii) Defendan Kedua selaku ejen dan kakitangan Defendan Pertama dan Ketiga telah secara bersesama dan berasingan menipu Plaintif-Plaintif serta berkonspirasi untuk menipu Plaintif-Plaintif dalam urusan jualbeli buah/hasil sawit dan telah menyebabkan kerugian kepada Plaintif-Plaintif.

[135] It is apparent that the evidence of SP1 Awang Soh bin Mohamad hinged on circumstantial evidence and was not within his own actual knowledge. While the evidence of SP2 Othman bin Hamat sought to prove the ingredient of motive for the purported acts of cheating, conspiracy to cheat and fraud and was very speculative and was not within his own actual knowledge. What is pertinent to note is this. That there was no independent corroboration of the evidence of SP2 Othman bin Hamat.

[136] The reception of hearsay evidence can only be described in one word. Unfortunate. When a witness testifies in court about what he heard from a third party who is not called as a witness that is hearsay evidence and it is inadmissible to prove the truth of the fact stated. In *Leong Hong Khie v. Public Prosecutor And Tan Gong Wai v. Public Prosecutor* [1986] 2 MLJ 206, Seah FJ had this to say about hearsay evidence (see p. 208):

> The general rule is that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. This rule has been long established as a fundamental principle of the law of evidence. To quote Lord Normand in *Teper v. R* [1952] AC 480, 486:

> The rule against the admission of hearsay evidence is fundamental. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost.
>
> In our opinion, another reason is the danger that hearsay evidence may be concocted, fabricated and tailored to suit the witness's testimony.

Each Of The Respondents Plaintiffs Must Prove The Loss Suffered

[137] All the 354 respondents plaintiffs are claiming damages and they must prove them. McGregor on *Damages*, 16th edn, at p. 236 sets out the law on damages in this way:

> A PLAINTIFF claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court both as to the fact of damage and as to its amount. If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where a right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages; this situation is illustrated by *Dixon v. Deveridge* [1825] 2 C & P 109 and *Twyman v. Knowles* [1853] 13 CB 222.

[138] Of course, if a particular plaintiff has suffered damage that is not too remote, he must be restored, so far as money can do it, to the position he would have been in had that particular damage not occurred (*Robinson v. Harman* [1848] English Reports 154, 1 Ex. 850; *Sally Wertheim v. Chicoutimi Pulp Company* [1911] AC 301 at 307, PC; *The "Edison"* [1933] Lloyd's List Law Reports Vol. 45. No. 5, at pp. 128 to 129, and *Sunley (B.) And Company, Limited v. Cunard White Star, Limited* [1940] 1 KB 740 at 745).

[139] In *Popular Industries Limited v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; ([1990] 2 CLJ (Rep) 635), Edgar Joseph Jr. J (as he then was) spoke of the general principles governing damages in these erudite terms (see p. 140 (p. 643) of the report):

> A word now about general principles. When a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong, and also that the damages are not too remote to be

recoverable. The principle of remoteness of damage is a limiting principle of policy and the principles applicable in contract and tort are not the same (see *Koufos v. Czarnikaw Ltd (The Heron II)* [1969] 1 AC 350.

[140] Continuing at p. 144 (p. 648) of the report, his Lordship Edgar Joseph Jr. J (as he then was) had this to say:

> In this context, I am reminded of Lord Goddard's dictum in *Bonham-Carter v. Hyde Park Hotel* [1948] WN 89 quoted with approval by Thomson CJ in *Lee Sau Kong v. Leow Cheng Chiang* [1960] 1 LNS 56; [1961] MLJ 17, namely, that:
>
> > Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, This is what I have lost, I ask you to give me these damages'. They have to prove it.
>
> Accordingly, all I can do is to make an award of nominal damages of US$500 that being the currency of the contract (see *Miliangos v. George Frank (Textiles) Ltd* [1975] QB 487) which I hereby do.

[141] In *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15, Edgar Joseph Jr. FCJ, speaking for the Federal Court, again quoted, with approval the passage from Lord Goddard in *Bonham Carter v. The Hyde Park Hotel, Ld.* [1948] WN 89.

[142] Finally, Abdul Malek Ahmad, JCA (who later rose to be the President of the Court of Appeal) in *Hock Huat Iron Foundry (suing as a firm) v. Naga Tembaga Sdn Bhd* [1999] 1 CLJ 89, at p. 115 had this to say:

> As to the question whether the defendant has proved its loss, the learned trial judge said that the law is clear that the burden of proving both the facts and the amount of damages lies on the person seeking damages before he can recover them, citing *Bonham-Carter v. Hyde Park Hotel Ltd* 64 TLR 177 and *Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635.

[143] The primary purpose of awarding damages is to compensate the aggrieved party for the harm done to him. Whereas the secondary purpose of awarding damages is to punish the

wrongdoer and this is done by imposing what is known as exemplary damages or punitive damages or vindictive damages or retributory damages (*Bell v. The Midland Railway Company* [1861] English Reports 142, 10 CB (NS) 287 at 308; *Cassell & Co. Ltd. v. Broome And Another* [1972] AC 1027; and *Rookes v. Barnard And Others* [1964] AC 1129).

[144] Exemplary damages would normally be ordered when the conduct of the wrongdoer has been outrageous as to merit such a.punishment. Thus, when the conduct of the wrongdoer discloses malice, cruelty, fraud, insolence, etc, then exemplary damages would be ordered.

[145] The learned judge of the High Court wrote his judgment in the Malay language and the English language translation has been provided to this court. I shall refer to the English language translation of the learned judge's judgment. In regard to the evidence of SP3 Tuan Fakhrur Razi bin Tuan Yusof, this was what the learned judge of the High Court had to say:

> PW3 then gave evidence on the calculations of the losses sustained by the Plaintiffs due to the deception and conspiracy by the Defendants. According to PW3 all 354 Plaintiffs sustained losses of RM7,146,291 in total. The basis of the calculation is the difference in the price of fruit per tonne which ought to have been paid to the settler multiplied by the total number of tonnes of fruit actually sold to the Felda factory. The formula is the actual price of palm fruit per tonne according to the quality of the fruit less (-) the price of palm fruit per tonne according to the grade valuation by the Felda factory multiplied (x) by the total volume.
>
> The grade of palm fruit valued by the Felda factory was in the region of KPG 17.5%. The price per tonne of palm fruit was RM250. KPG 1% is equivalent to RM14.28 (250/17). The grade valued by the Felda factory was KPG 17.5%. The KPG ought to have been graded as 21%. The difference in the KPG which ought to have been paid to the Plaintiffs is 21% - 17.5% = 3.5%. Total loss for the year 1997 is 56.27 x 21,166.67 - RM1,191,048.52 (56.27 is the price difference. 21,166.67 is the volume in tonnes). The loss incurred by the Plaintiffs for the years 1997-2002 is RM1,191,048.52 x 6 years = RM7,146,291.12.
>
> The Court finds that the sum of the calculations done by PW3 is simple, clear and correct.

[146] And the learned judge of the High Court proceeded to state that:

A

> 6. For the first issue, the Court is of the view that the Plaintiffs have succeeded in proving their claim against the Defendants.
>
> 7. In respect of the second issue, the Court accepts the calculations done by PW3. The calculation is simple, reasonable and convincing. Therefore the Court allows the Plaintiffs' claim as per the calculation done by PW3.

B

[147] It can be surmised that the learned judge of the High Court had accepted wholesale the testimony of SP3 Tuan Fakhrur Razi bin Tuan Yusof in regard to the respondents plaintiffs' claim for damages. His Lordship accepted the testimony of SP3 that the alleged discrepancy in the price of oil palm fruit bunches per tonne at the rate of RM250 per tonne when there was no documentary evidence for this amount for three years from 1997 to 2000 before the learned judge. I wonder where did SP3 get the rate of RM250 per tonne from. It seems to me that SP3 wrote down the figure of RM250 per tonne, so to speak, and threw them before the learned judge of the High Court and asked to be given that amount without proving it. That cannot be right.

[148] In fact, there was no documentary evidence before the learned judge of the High Court to support the actual loss or estimated loss suffered by each individual respondent plaintiff.

[149] The learned judge of the High Court also failed to take into account the failure of the learned counsel for the respondents plaintiffs to call each individual respondent plaintiff to give evidence of the actual loss alleged to be suffered by each individual respondent plaintiff bearing in mind that individually each of them would have suffered a different quantum of loss. It must be borne in mind that individually each of them may have different grades of fruits that have been harvested.

[150] For all these reasons, the learned judge of the High Court misdirected himself during the course of the trial and he failed to "judicially appreciate the evidence" that was put before him.

[151] As promised, I will now say something about representative action. Order 15 r. 12 of the RHC makes reference to representative proceedings and it is worded as follows:

> **12 Representative proceedings (O. 15 r. 12)**
>
> (1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and, unless the Court

otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) At any stage of proceedings under this rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under rule 6 adding that person as a defendant.

(3) A judgment or order given in proceedings under this rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.

(4) An application for the grant of leave under paragraph (3) must be made by summons which must be served personally on the person against whom it is sought to enforce the judgment or order.

(5) Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.

(6) The Court hearing an application for the grant of leave under paragraph (3) may order the question whether the judgment or order is enforceable against the person against whom the application is made to be tried and determined in any manner in which any issue or question in an action may be tried and determined.

[152] The present action should have been filed in the form of a representative action under O. 15 r. 12 of the RHC bearing in mind that there are 384 respondents plaintiffs. The first respondent plaintiff in the amended statement of claim goes by the name of Awang Soh bin Mamat bearing identity card number 510914-03-5139. The respondents plaintiffs' first witness was SP1 and his name is Awang Soh bin Mohamad bearing identity card number 510914-03-5139. It appears that two persons are having the

same identity card number. Awang Soh bin Mamat may be the same person as Awang Soh bin Mohamad but there is no evidence to this effect. However, relying on the amended statement of claim it should be Awang Soh bin Mamat. See the amended statement of claim at p. 52 of the appeal record at vol. 1 as well as the notes of evidence at p. 144 of the appeal record at vol. 2.

[153] Be that as it may, SP2 Othman bin Hamat is listed as respondent plaintiff number 304 in the amended statement of claim at p. 71 of the appeal record at vol. 1. While SP3 Tuan Fakhrur Razi bin Tuan Yusof is listed as respondent plaintiff number 101 in the amended statement of claim at p. 58 of the appeal record at vol. 1.

[154] Nowhere in the amended statement of claim is there an assertion that these three witnesses SP1, SP2 and SP3 are representing the other remaining respondents plaintiffs as required under O. 15 r. 12 of the RHC. *Inter alia*, it is for these reasons that I hold that the action was not a representative action.

[155] Order 15 r. 12 of the RHC envisages a situation where one action would determine the rights of a number of persons against another party called the defendant. According to Lord Shand in *The Duke of Bedford v. Ellis And Others* [1901] AC 1 at 14, where numerous persons have "the same interest in one cause or matter" then "one or more of such persons may sue or be sued ... on behalf or for the benefit of all persons so interested". In *Tang Kwor Ham & Ors v. Pengurusan Danaharta Bhd & Ors* [2003] 7 CLJ 205, Low Hop Bing J (now JCA) held, *inter alia*, that a representative action is regulated by O. 15 r. 12 of the RHC.

[156] There are four requirements to r. 12 of O. 15 of the RHC. Firstly, there must be numerous persons involved. Secondly, there must be the same common interest in regard to the subject matter. Thirdly, the relief sought must not be personal but must be beneficial to the class as a whole. Fourthly, the parties represented must be of a defined class and it is not difficult to determine whether a person is a member of that class. See *Markt & Co., Limited v. Knight Steamship Company, Limited, Sale & Frazar v. Knight Steamship Company, Limited* [1910] 2 KB 1021 at 1040; *Palmco Holding Bhd. v. Sakapp Commodities (M) Sdn. Bhd. & Ors.* [1986] 1 LNS 124; and *Jok Jau Evong & Ors v. Marabong Lumber Sdn Bhd & Ors* [1990] 2 CLJ 625; [1990] 2 CLJ (Rep) 169.

[157] The amended statement of claim makes no reference to O. 15 r. 12 of the RHC. This was not the case where SP1 together with SP2 and SP3 are suing the appellants defendants on behalf and for the benefit of the other respondents plaintiffs. That being the case, each of the 384 respondents plaintiffs should testify in court bearing in mind that each of them may have different grades of fruits that have been harvested and, consequently, each one of them too may have different quantum of damages.

Conclusion

[158] For the reasons adumbrated above, I would allow this appeal and I make an order that the costs incurred below and here to be borne by the appellants defendants. I also set aside all the orders of the learned judge of the High Court and a re-trial is hereby ordered before another judge of the High Court. Deposit to be returned to the appellants defendants.

[159] As a matter of courtesy I have shown my draft judgment to James Foong Cheng Yuen, FCJ and Abdull Hamid Embong, JCA.